UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 10-13164-cgm

- x

In the Matter of:

FAIRFIELD SENTRY LIMITED AND NOMURA INTERNATIONAL PLC,

Debtor.

- x

Adv. Case No. 10-03626-cgm

- x

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

Plaintiffs,

v.

BGL BNP PARIBAS, S.A. et al.,

Defendants.

- x

Adv. Case No. 10-03627-cgm

- x

KRYS et al.,

Plaintiffs,

v.

BNP PARIBAS SECURITIES SERVICES LUXEMBOURG et al.,

Defendants.

- x

Adv. Case No. 10-03635-cgm

- x

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

Plaintiffs,

v.

UNION BANCAIRE PRIVEE, UBP SA et al.,

Defendants.

- x

Adv. Case No. 10-03636-cgm

- x

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

Plaintiffs,

v.

UNION BANCAIRE PRIVEE, UBP SA et al.,

Defendants.

- x

Adv. Case No. 11-01579-cgm

- x

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

Plaintiffs,

v.

BNP PARIBAS SECURITIES NOMINEES LTD. et al.,

Defendants.

- x

Adv. Case No. 11-01617-cgm

- x

FAIRFIELD SENTRY LIMITED (IN LIQUIDATION) et al.,

Plaintiffs,

v.

FORTIS BANK SA/NV et al.,

Defendants.

- x

United States Bankruptcy Court

355 Main Street

Poughkeepsie, NY 12601

March 15, 2023

2:00 PM

B E F O R E :

HON CECELIA G. MORRIS

U.S. BANKRUPTCY JUDGE

ECRO: UNKNOWN

HEARING re 10-03626-cgm Doc# 163 Motion to File Under Seal Motion for Sanctions and Certain Exhibits filed by David Elsberg on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03626-cgm Doc# 164 Joint Motion to File Under Seal Brief in Opposition to Liquidators' Motion for Sanctions and Certain Exhibits filed by Ari MacKinnon on behalf of BGL BNP Paribas, S.A..

HEARING re 10-03626-cgm Doc# 165 Joint Motion to File Under Seal Brief in Further Support of the Liquidators' Motion for Sanctions (related document(s)163) filed by Joshua S Margolin on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03627-cgm Doc# 243 Motion to File Under Seal Motion for Sanctions and Certain Exhibits filed by Joshua S Margolin on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03627-cgm Doc# 244 Joint Motion to File Under Seal Brief in Opposition to Liquidators' Motion for Sanctions and Certain Exhibits filed by Ari MacKinnon on behalf of BNP Paribas Securities Services Luxembourg.

HEARING re 10-03627-cgm Doc# 245 Joint Motion to File Under Seal Brief in Further Support of the Liquidators' Motion for Sanctions (related document(s)243) filed by Joshua S Margolin on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03635-cgm Doc# 1001 Motion to File Under Seal Motion for Sanctions (BNP SUISSE) and Certain Exhibits filed by David Elsberg on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03635-cgm Doc# 987 Notice of Adjournment of Hearing RE: Pre Trial Conference; hearing not held and adjourned to 1/18/2023 at 10:00 AM at Videoconference (ZoomGov) (CGM) .

HEARING re 10-03635-cgm Doc# 1006 Joint Motion to File Under Seal Brief in Opposition to Liquidators' Motion for Sanctions and Certain Exhibits filed by Ari MacKinnon on behalf of BNP Paribas (Suisse) SA, BNP Paribas (Suisse) SA Ex Fortis, BNP Paribas (Suisse) SA Private.

HEARING re 10-03635-cgm Doc# 1004 Memorandum of Law In Opposition to Motion for Sanctions (related document(s)1000) filed by Jeff E. Butler on behalf of Dexia Banque International a Luxembourg.

HEARING re 10-03635-cgm Doc# 1000 Motion to File Under Seal Motion for Sanctions (BNP SUISSE) and Certain Exhibits filed by David Elsberg on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03635-cgm Doc# 1008 Joint Motion to File Under Seal Brief in Further Support of the Liquidators' Motion for Sanctions (related document(s)1001) filed by Joshua S Margolin on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03635-cgm Doc# 1007 Joint Motion to File Under Seal Brief in Further Support of the Liquidators' Motion for Sanctions (related document(s)1000) filed by David S. Flugman on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign

Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03636-cgm Doc# 1070 Notice of Adjournment of Hearing RE: Pre Trial Conference; hearing not held and adjourned to 1/18/2023 at 10:00 AM at Videoconference (ZoomGov) (CGM) .

HEARING re 10-03636-cgm Doc# 1083 Motion to File Under Seal Motion for Sanctions and Certain Exhibits filed by David Elsberg on behalf of Fairfield Lambda Limited (In Liquidation), Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof, Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03636-cgm Doc# 1084 Motion to File Under Seal Motion for Sanctions (BNP SUISSE) and Certain Exhibits filed by David Elsberg on behalf of Fairfield Lambda Limited (In Liquidation), Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof, Kenneth Krys, solely in his capacity as

Foreign Representative and Liquidator thereof.

HEARING re 10-03636-cgm Doc# 1093 Joint Motion to File Under Seal Brief in Opposition to Liquidators' Motion for Sanctions and Certain Exhibits filed by Ari MacKinnon on behalf of BNP Paribas (Suisse) SA, BNP Paribas (Suisse) SA Ex Fortis, BNP Paribas (Suisse) SA Private.

HEARING re 10-03636-cgm Doc# 1091 Memorandum of Law In Opposition to Motion for Sanctions (related document(s)1083) filed by Jeff E. Butler on behalf of Dexia Banque International a Luxembourg.

HEARING re 10-03636-cgm Doc# 1094 Joint Motion to File Under Seal Brief in Further Support of the Liquidators' Motion for Sanctions (related document(s)1083) filed by David S. Flugman on behalf of Fairfield Lambda Limited (In Liquidation), Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof, Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 10-03636-cgm Doc# 1095 Joint Motion to File Under Seal Brief in Further Support of the Liquidators' Motion for Sanctions (related document(s)1084) filed by Joshua S Margolin on behalf of Fairfield Lambda Limited (In Liquidation), Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof, Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 11-01579-cgm Doc# 154 Motion to File Under Seal Motion for Sanctions and Certain Exhibits filed by David Elsberg on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 11-01579-cgm Doc# 155 Joint Motion to File Under Seal Brief in Opposition to Liquidators' Motion for Sanctions and Certain Exhibits filed by Ari MacKinnon on behalf of BNP Paribas Securities Nominees Ltd..

HEARING re 11-01579-cgm Doc# 156 Joint Motion to File Under Seal Brief in Further Support of the Liquidators' Motion for Sanctions (related document(s)163) filed by Joshua S Margolin on behalf of Fairfield Sentry Limited (In Liquidation), Fairfield Sigma Limited (In Liquidation), Kenneth Krys, solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 11-01617-cgm Doc# 150 Motion to File Under Seal Motion for Sanctions and Certain Exhibits filed by David Elsberg on behalf of Fairfield Sentry Limited (In Liquidation), Kenneth Krys solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

HEARING re 11-01617-cgm Doc# 151 Joint Motion to File Under Seal Brief in Opposition to Liquidators' Motion for Sanctions and Certain Exhibits filed by Ari MacKinnon on behalf of Fortis Bank SA/NV.

HEARING re 11-01617-cgm Doc# 152 Joint Motion to File Under Seal Brief in Further Support of the Liquidators' Motion for Sanctions (related document(s)150) filed by Joshua S Margolin on behalf of Fairfield Sentry Limited (In Liquidation), Kenneth Krys solely in his capacity as Foreign Representative and Liquidator thereof, Greig Mitchell, solely in his capacity as Foreign Representative and Liquidator thereof.

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P R O C E E D I N G S

THE COURT: Good morning. I believe the -- what we first have on the agenda are the Fairfield Sentry Limited Adversary proceedings, and it's the Fairfield Sentry Limited in the Chapter 15 case 10-13164, and then adversary proceedings 10-03626, 10-03627, 10-03635, 10-03636, 11-01579, 11-01617. And please break them up in the way that you need to break them up and let me know which you're arguing. State your name and affiliation.

MR. MARGOLIN: Your Honor, this is Joshua Margolin from Selendy Gay Elsberg on behalf of the Liquidators Ken Krys and Greg Mitchell.

THE COURT: We might want to start with the spoilage ones first.

MR. MARGOLIN: We agree, Your Honor. We the Defendants in the spoliation motions conferred before the conference, and we agree that starting with those motions makes the most sense. And what we plan to do is start with the BNP motions and proceed in a way that avoids redundancy and repetition as much as possible. And then once those motions are complete, I will hand over to my partner David Flugman, who will be handling the spoliation motion for Banque Internationale A Luxembourg, which is 10-3635 and 10-3636.

THE COURT: Okay. Very good.

MR. FLUGMAN: And good morning, Your Honor. Just for the record, David Flugman from Selendy Gay Elsberg also for the Liquidators.

THE COURT: You've got a major echo. When you get ready to argue, make sure you tell me which absolute case we're dealing with at that moment so that we're not bouncing around and I don't get lost. Did one of them come off the calendar?

MR. MARGOLIN: I don't believe so, Your Honor.

THE COURT: Okay. Just curious.

MR. MARGOLIN: Okay. Well, once other counsel make their introductions, we're happy to proceed with BNP.

THE COURT: Are you testing it again?

MR. COOPER: Your Honor, excuse me, this is Roger Cooper. I'm from Cleary Gottlieb on behalf of the Defendants. We're having a technical problem and --

THE COURT: Sure.

MR. COOPER: -- Mr. MacKinnon is going to argue. The computer he's using lost the connection, so if we could just have a minute before we start the argument to try to --

THE COURT: I have my team.

MR. COOPER: -- (indiscernible) the issue.

THE COURT: And just so you know, I fought with the printer all morning before you all got on. I had a printer that wouldn't print, so --

MR. COOPER: Well, I hope you won.

THE COURT: I had to call in help.

MR. COOPER: There's no shame in getting reinforcements.

THE COURT: Thank you for that because I spent too much time before I did call in help. I got stubborn. It's like I can fix this, and no, no, I couldn't. And it was nothing. Of course it was nothing, but --

MR. COOPER: We won't tell anyone. Don't worry.

MR. MACKINNON: Hi, Your Honor. This is Ari MacKinnon from Cleary and Gottlieb. I'm going to take my partner's computer and use it because it seems to be working just fine. And I'm going to change the name.

THE COURT: You're very, very clear to us.

MR. MACKINNON: Okay. Excellent. Thank you very much for your indulgence. I'm going to change the name as it appears because it's showing Jack Massey. I'll change it to Ari MacKinnon.

MR. BUTLER: Your Honor, just to complete the record, my name's Jeff Butler from Clifford Chance representing Banque Internationale A Luxembourg when we get to that portion of the program.

THE COURT: Okay. Right now we're on -- tell me what adversary proceeding number we're dealing with right now.

MR. MARGOLIN: So, Your Honor, we're going to start with the five spoliation motions --

THE COURT: Right.

MR. MARGOLIN: -- against the BNP Defendants. And just so the record is clear --

THE COURT: Yes.

MR. MARGOLIN: -- the first is BNP Paribas Suisse, which is 10-3635. The second is BGL BNP Paribas, S.A., which is 10-3626. The third is BNP Paribas Securities Services Luxembourg, which we'll refer to as SSL, which is 10-3627. The next is BNP Paribas Securities Nominees Limited, which is 11-1579. And the final BNP motion is BNP Paribas Fortis, which 11-1617.

THE COURT: Thank you. I really want this record clear on this for everyone's sake. Okay.

MR. MARGOLIN: Of course. And Your Honor, our intention is to address issues that are global and kind of uniform across these Defendants together and of course call out the specific details for each Defendant as we proceed to the argument. And so --

THE COURT: Perfect.

MR. MARGOLIN: -- with your permission, I'd like to proceed.

THE COURT: Very good. Please go forward. And everyone, before you begin any talk, make sure you restate

your name for the record so that, again, we have a very clear record. Thank you.

MR. MARGOLIN: Okay. Well, just so the record is clear, this is Joshua Margolin from Selendy Gay Elsberg on behalf of the Liquidators Ken Krys and Greg Mitchell. Your Honor, we do not make these motions lightly. They're the result of months of effort to uncover what happened to PNB's ESI. The Liquidators here seek both a preclusion order and an adverse inference because what we discovered, BNP's spoliation, directly prejudices the Liquidators' ability to respond to BNP's arguments that these cases should be dismissed because BNP lacked jurisdictional contacts.

As you might recall from the fall, we wrote the court with what appeared to be evidence of significant spoliation. First, across all five BNP entities that we're moving on today, they have produced a total of seven emails. And second, emails obtained from third parties demonstrate that the BNP entities had lost correspondence reflecting jurisdictional contacts, including emails with U.S. entities, correspondence concerning diligence of the funds and Madoff, and even emails reflecting a visit to New York to meet with the Fairfield-Greenwich Group, the funds investment manager.

So consistent with Your Honor's prior guidance, we took 30(b)(6) depositions, and that discovery revealed why

this ESI was lost. BNP's categorical disregard of its obligation to preserve evidence across each of these actions. Across each of these five Defendants, there were multiple failures on the most elementary preservation obligations. In each case, and that means all five of the BNP entities, there was an inexcusable delay before setting a litigation hold, whether measured from BLMIS' collapse and that each Defendant concedes notice of or measured from when each parties concedes notice of the cases at issue.

For BNP Swiss, it sent the litigation hold 28 months after BLMIS' collapse and nine months after it concedes knowledge of this case. For BGL BNP, it sent a litigation hold 20 months after the collapse and two months after notice of this case, but that litigation hold was sent to one relevant custodian. It was not until 30 months after BLMIS' collapse and nearly a year after it was aware of this litigation that the remaining 34 employees that BGL BNP have deemed most likely to have relevant information received the litigation hold.

BNP SSL waited two years after the collapse and seven months after notice of this suit before sending a litigation hold. Sec. Nom. waited five years after collapse and two years after notice of this suit before sending a litigation hold. And BNP Fortis waited 28 months after the collapse.

Even when a litigation hold was sent, each Defendant improperly relied on the implementation of that litigation hold purely on its own employees with no supervision, no guidance, and no follow-up. The 30(b)(6) testimony across all Defendants was crystal clear. Each BNP entity did nothing more than send a litigation hold. This is directly contrary to Zubulake, which has been black-letter law in this circuit since 2004, and makes plain that simply sending a litigation hold is insufficient. This is not a set-it-and-forget-it scenario.

That is unreasonable. Zubulake makes clear that it is unreasonable to expect compliance with a litigation hold without active supervision and follow up, yet no Defendant engaged in that behavior. In many instances, the litigation hold was not even sent to custodians that the BNP Defendants now concede are most likely to have possessed relevant information. For BNP Suisse and BNP Sec. Nom., a litigation hold was never sent to a single custodian identified by those parties as potentially possessing relevant information.

For BNP SSL, only 2 of 31 custodians identified as likely to have relevant information ever received a litigation hold. For BGL BNP, as I said, only one custodian received the initial litigation hold, and it was another year for the remaining 34 custodians to receive any notice

that they should be preserving documents. There's also no evidence that there was any attempt to interview any of these custodians to understand how they stored information, where relevant information might be, or to remind them of the litigation hold and their continued obligations to preserve. That, too, runs afoul of the clear language in Zubulake.

Your Honor, as soon as a party reasonably anticipates litigation, it must suspend routine document retention and destruction policies. It must change its policies to take account of the litigation hold, yet not a single BNP Defendant suspended document destruction policies, including an employee's ability to delete emails at will. It's impossible to know how many emails were lost as a result of this failure, but that failure is inexcusable.

For BNP Suisse, this led to the loss of CDs containing the emails of 22 relevant custodians, as well as the loss of a hard drive also potentially containing relevant emails. BNP Suisse had a policy of creating CDs upon an employee's departure containing those employee's emails, and BNP Suisse has a policy that it maintains those CDs for ten years, at which point they are destroyed. In fact, the policy required two copies of each CD, one maintained by the IT Department, one maintained by the HR

Department. Yet the CDs for these 22 custodians cannot be found, and there is no explanation for where they are other than that they were destroyed at the 10-year mark pursuant to this policy.

Your Honor, we asked when the first time BNP Suisse looked for these CDs, and the deponent told us that the only search that she was aware of was in 2022 in connection with personal jurisdiction discovery. The same is true for the hard drive. The only time the witness could testify that this was ever even looked for was in 2022 in connection with discovery for personal jurisdiction.

In BGL BNP's case, it never suspended a policy to delete departing employees' emails within 90 days or its policy to delete external email archives within 10 years. BNP SSL kept in place until 2015 a policy that deleted email archives for departing employees one month after departure. And it's important to recognize here, Your Honor, the timeline we're talking about. This is all after notice of this litigation, after each Defendant concedes that they were aware of this litigation, these policies were not suspended, they were active, and they were destroying information. For BNP Sec. Nom., it actually instituted a 10-year deletion policy in 2013, and its own 30(b)(6) witness testified that this policy was responsible for custodial emails being deleted as late as 2018. In fact --

THE COURT: I'm going to ask a favor of you.

MR. MARGOLIN: Please.

THE COURT: To make the record clear, Sec. Nom. is what? And if --

MR. MARGOLIN: I apologize.

THE COURT: -- any one of you make the arguments, make sure you make it clear which one you're talking about.

MR. MARGOLIN: Yes, and I'm sorry for the confusion. Sec. Nom. --

THE COURT: Yeah, you all are -- don't consolidate things. Just say what they are.

MR. MARGOLIN: Okay. BNP Sec. Nom. for the record is BNP Paribas Securities Nominees Limited --

THE COURT: I could figure that out, but --

MR. MARGOLIN: Okay.

THE COURT: -- you need to say it for the record.

MR. MARGOLIN: I will. I apologize, Your Honor.

THE COURT: Same thing with Swiss. Say it for the record.

MR. MARGOLIN: I will.

THE COURT: It may take a little bit more time, but we're going to be clear.

MR. MARGOLIN: I'm happy to do so.

THE COURT: Thank you.

MR. MARGOLIN: Your Honor, with respect to these

deletion policies, Cleary counsel for the BNP Defendants was updating its narrative about the various preservation and disruption policies up through depositions in some cases with Selendy Gay Elsberg receiving new information the morning of depositions. This reflects not just a failure to identify information to preserve, but a failure to understand the policies that could impact preservation. Again, under Zubulake, the parties and counsel have an obligation at the time the duty arises to preserve to have conducted this investigation and know this information.

It is unacceptable to be in 2022 and still discovery allegedly new information about these policies and where documents are stored and what happens with them. But Your Honor, the failures do not stop at the distribution and implementation of litigation holds and the failure to suspend policies. Not a single Defendant centrally collected email correspondence in order to preserve it. And in the case of BNP Paribas Suisse, it actually asks the individual email custodians for whom it managed to have email to run their own email searches without any supervision, a practice that is routinely frowned upon by courts.

Another notable example comes from BGL BNP Paribas. In that case, BGL became the majority stakeholder of BNPPL, which is the entity that invested in the funds, in

February 2010. And BNPPL's business activities were transferred to BGL BNP no later than October 2010. At this point in time between February and October, there is no dispute that these entities were not aware of BLIMS' collapse, and that they became aware of this litigation. Yet BGL BNP has no idea what happened to BNPPL's ESI. The 30(b)(6) witness testified, "All I can say is we don't know what happened to the emails, right? We don't know if they were deleted in the ordinary course. We don't know if the BNPPL emails were transferred to BGL."

The answer is clear. Either BGL failed to obtain ESI from BNPPL, which was a corporate affiliate at the time and is now lost, or it obtained this information, and it has been destroyed due to BGL's own acts. Another entity, BNP Paribas Fortis, actually conducted a 2022 audit of its litigation hold and refused to disclose the facts discovered to the Court, the liquidators, or even its own 30(b)(6) witness claiming this information is privileged. This is plainly improper.

The law is clear that the underlying facts that would've been discovered by this audit are not protected by privilege, and that the 30(b)(6) witness should've investigated these facts and been armed with this information rather than being intentionally shielded from it, especially here where this is the exact information that

was called for by the deposition notice served upon BNP Paribas Fortis. But we don't need the results, Your Honor, as the implication of the attempt to hide the audit is clear. The audit reveals spoliation. And all the while each entity was represented by highly sophisticated counsel at Cleary Gottlieb, who is here today, and who is no doubt well-versed in the appropriate and necessary steps to preserve ESI, yet they failed.

And as a result of this conduct, BGL BNP Paribas and BNP Paribas Securities Nominees Limited were both unable to identify any ESI for the relevant custodians in the relevant period. BNP Paribas Suisse produced no emails from the relevant period. BNP Paribas Securities Services Luxembourg produced just five emails, and BNP Paribas Fortis produced just two emails and three attachments.

BNP and Cleary have offered no explanation for their failure to meet the basic well-established requirements for preserving documents. In fact, and kind of insultingly, they dismissed this litany of errors as "quibbles" or "ticky tacky complaints". And in fact, they're anything but. They are the fundamentals of document preservation. BNP's explanation for what happened to these documents holds no water.

All of the BNP Defendants designated a single 30(b)(6) witness to represent them during the 30(b)(6)

deposition. That 30(b)(6) witness for each deposition was unable to offer any factual explanation for the near complete absence of ESI available and produced in this case. She had not spoken to a single relevant custodian about their document preservation practices or about their document destruction practices. She could not explain what happened to any of the missing ESI, so that is the BNP Defendant's testimony. They just don't know, and that is an unacceptable state of affairs.

And in their briefing, the only explanation they could must was that all of the missing ESI was deleted in the ordinary course of business before they realized they had a duty to preserve it. This is an explanation they offer uniformly across five BNP Defendants. And what they're doing is they're asking Your Honor to believe that virtually all custodians across these five entities all happened to deleted virtually all Fairfield related ESI before they were on notice of the litigation.

Frankly, I mean, this would be an amazing coincidence, and the Court shouldn't credit it. This explanation also lacks any basis in the record. BNP did not speak to the relevant custodians. It did not investigate their deletion practices, and so has no basis to guess at when or under circumstances its ESI was destroyed. Moreover, this explanation ignores what the record does

clearly support and what is the only plausible explanation here, that substantial ESI was lost due to deliberate action, or in most cases inaction, by the BNP Defendants. At worst, BNP's explanation suggests a coordinated attempt to destroy evidence across a corporate family.

Your Honor, in instances of spoliation as here, Rule 37(e) provides for relief for prejudiced parties like the Liquidators. First, under that rule, the Liquidators have shown that the BNP Defendants were reasonably on notice of potential litigation with the collapse of BLMIS in 2008. It's an objective standard, and we know that the BNP Defendants were immediately on notice of the collapse of BLMIS in 2008, that they had money in Sentry, and that they knew money and Sentry meant money and BLMIS. The question then is whether a sophisticated financial institution in the position of these Defendants would've reasonably foreseen the prospect for litigation in the wake of the collapse of the largest Ponzi scheme in history.

We think this is an easy question, Your Honor, and the answer is yes. And it's exactly the type of incident which tends to trigger litigation and put individuals on notice. BNP makes two arguments for why it had no reason to be on notice of litigation -- the potential for litigation in 2008. First, it argues that a foreign entity would have no reason to anticipate litigation in the United States and

its attendants' document preservation obligations. And second, because almost all of the entities were only executing trades, it had no reason to anticipate that it would be subject to sue. But those arguments are circular, and they depend entirely on the ESI that each BNP entity has spoliated.

The ESI that's now missing would show precisely what BNP knew about the funds' connection to the United States and would show the precise role that BNP played in those investments, but that information has been destroyed. Moreover, and as discussed in our briefs, the limited evidence that Liquidators have obtained from third parties demonstrates that the BNP entities were seeking and obtaining diligence on the funds, which really puts the lie to the suggestion that they were merely executing trades.

Second, under the rule, the Liquidators have shown that the BNP Defendants did not take reasonable steps to preserve documents even after they concede notice of these cases. And Your Honor, I'm not going to go through each example I went through above, but reasonable steps means more than just refraining from destroying evidence. It means taking affirmative steps to avoid spoliation of relevant evidence. And again, Zubulake makes that clear. Yet here, none of the steps that Zubulake demands were followed, and they simply have no answer for their failures,

which I've already again discussed at length.

Third, under the rule, the Liquidators have shown that the ESI that BNP spoliated cannot be restored or replaced. It's true the Liquidators have obtained some documents from third parties, but where as here third party documents replace some, but no one can say how much of the missing ESI, courts find that third party productions did not restore or replace missing ESI. You'll probably hear from the BNP Defendants that third party documents do replace the ESI that they destroyed.

First, it's inequitable to leave the Liquidators at the whim of whatever third parties happen to have saved. But more importantly, the BNP Defendants have no support for the proposition that these third party documents completely fill the gap that they created by spoliation. We asked in every deposition and every last time the BNP witnesses -- witness could not say who was emailing, how often they were emailing, what the content of the emails were, or who they were emailing with. So they can ever say and they are not in the position to say that the third party productions replace what they themselves destroyed, nor do the third party productions provide any substitute for the almost total lack of internal email correspondence and meta data that BNP continues to possess.

In a normal case, Your Honor, we would look for

gaps in the BNP productions to see what was missing and what gaps third parties could fill in. Here, we can't do that. BNP's wholesale spoliation has robbed the Liquidators and the Court of the ability to do that type of analysis, and that should not benefit them. Your Honor, the BNP Defendant's spoliation has plainly prejudiced the Liquidators. The courts ask in addressing prejudice is that the evidence plausibly suggests that spoliated ESI could support the Movant's case, and we submit that we have made that showing.

The BNP Defendants have submitted motions to dismiss on personal jurisdiction grounds arguing that the Liquidators have insufficiently alleged that the BNP Defendants had relevant contacts with the United States. But the spoliation here was so total that neither party, not the Liquidators and not BNP, can say with any certainty the whole universe of what documents existed. But emails obtained from third parties show that each BNP Defendant was engaged in jurisdictionally relevant contacts. These documents, which are attached to our moving papers, plausibly suggest that the spoliated documents would show the existence of more contacts with the United States, which are now lost.

The Liquidators are entitled to relief now because otherwise Liquidators would be forced to respond to BNP's

arguments on personal jurisdiction on an uneven playing field that BNP itself created. BNP argues that there is insufficient evidence of jurisdictional contacts. That is an overt attempt to take advantage of their own spoliation. Having destroyed the evidence, they should not be permitted to benefit by arguing about what emails that no longer exist, would have shown, would have said, or what the volume of them may have been.

BNP curiously argues that the relief that we're seeking here is premature and that the Court should postpone a decision until after an ultimate decision on personal jurisdiction is made, and that's simply wrong. The Liquidators have the right to marshal the strongest evidence and make the strongest arguments that they can to oppose the personal jurisdiction motion to dismiss. The BNP spoliation has prevented that, and so a ruling on the spoliation motion now is required.

Your Honor, in light of all this, the Liquidators respectfully request two forms of relief. First, our preclusion orders under Rule 37(e)(1), we ask that Your Honor prevent the BNP Defendants from making any argument about the content or volume of communications that they have spoliated. Just to give an example, this would prevent BNP from claiming that they never communicated with FTG. It would prevent them from claiming it only communicated with

FTG infrequently. It would prevent BNP from making any claim about the contents of spoliated emails with FTG. That's just an example.

A preclusion order will remedy some but not all of the prejudice the Liquidators have suffered because the Liquidators are still subject to the whim of what they have been able to obtain from third parties. Accordingly, we also seek an adverse inference under Rule 37(e)(2). The massive failure across each BNP entity here demonstrates something more than mistake or unreasonable conduct. It demonstrates a conscious dereliction of known duties to preserve. Repeated conscious dereliction of known duties to preserve. And the BNP Defendants, not a single one of them, have any explanation for their conduct, nor have they offered one.

In these scenarios, courts may enter an adverse inference to sanction this kind of conduct in litigation and to restore the parties to their positions they would've been in but for spoliators' conduct. Our request, accordingly, is that the Court presume that the ESI that the BNP Defendants deleted would've supported personal jurisdiction. Specifically, the Liquidators seek as a sanction an inference that the spoliated evidence would've been favorable to the liquidators in establishing personal jurisdiction.

The Liquidators ask the Court to infer that the spoliated evidence would've shown that the BNP Defendants intentionally invested in the funds knowing they were feeder funds to United States based BLMIS. We ask for an adverse inference that the BNP Defendants communicated about and utilized U.S. correspondent bank accounts to invest in the funds. On the whole, we are seeking an adverse inference that the spoliated documents would have reflected the BNP Defendants' purposeful and knowing availment of U.S. jurisdiction.

An adverse inference, Your Honor, is the only form of relief that will fully redress the prejudice from BNP's spoliation. Without it, because of their destruction of documents, the Liquidators are limited to the documents they were able to obtain from third parties. An adverse inference here fairly levels the playing field by letting the Court assume that the destroyed documents would've supported a finding of jurisdiction. This inference is appropriate given the decade-long conscious disregard that each BNP Defendant had for its preservation obligations, which are so clear under the law.

Your Honor, with that, I am open for questions. And not, I'm happy to hand the microphone over to Mr. MacKinnon.

THE COURT: Very good. Pass the microphone. I

have no questions.

MR. MACKINNON: Good morning, Your Honor. Thank you very much. My name's Ari MacKinnon. I'm a partner at Cleary Gottlieb Steen and Hamilton appearing on behalf of the five BNPP entities. That's BNPP Fortis, BNPP 2S Luxembourg, BNPP Securities Nominees, BNPP Suisse, and BGL BNPP. To avoid unnecessary repetition, I'm going to follow Mr. Margolin a bit and begin my presentation by discussing some overarching points that are common to the five BNPP entities, and then I'd like to conclude by discussion some points that are specific to each of them.

And obviously, Your Honor, very happy to take any questions that you may have. Your Honor, we take very seriously our discovery obligations to this Court and to our counterparty. We acknowledge that there were issues with the document preservation processes followed in some of these cases, and I intend to get into that later on in my presentation. But the Liquidators still have a hefty burden to carry --

THE COURT: Let me just ask you one question then.

MR. MACKINNON: Yes, please.

THE COURT: Which one of these was the evidence of what they were looking for found? Name one.

MR. MACKINNON: BNPP Fortis. For example, I'd be happy to start right there.

THE COURT: Please do.

MR. MACKINNON: If you'd like. Okay. So I'll turn to BNPP Fortis just to start my presentation. So the Liquidators filed their complaint against BNPP Fortis on March 4, 2011. BNPP Fortis received notice of that complaint on March 18, 2011 approximately two weeks later. The record reflects that shortly after the filing of the complaint, Fortis collected transactional data, subscription agreements, redemption agreements, and other such materials that could be located at the time, and sent those materials along to Cleary Gottlieb in April about three weeks after receiving notice of the complaint.

Fortis also took steps to identify individuals who might possess relevant information and to send them a Document Hold Notice that covered not only transactional data, but all forms of ESI, including emails. That notice went out on April 11, 2011. That's three weeks after receiving notice of the complaint. The Document Hold Notice clearly instructed employees to preserve and not to destroy all documents related in any way to BLMIS, Madoff, or to Fairfield.

In response to the circulation of that hold, BNPP Fortis in-house counsel learned that relevant documents might be located in a shared network space, sort of a shared electronic folder, and in hard copy boxes. That shared

network space and those hard copy boxes have been preserved to the present day. In addition to being instructed that they were not to destroy any relevant documents, including emails, if and when any of the recipients of the Hold Notice left Fortis, if and when they left, their email boxes were imaged. The full contents of their email boxes were imaged. So they were told not to destroy, and then when they left and all of our key custodians from Fortis left, their email boxes were imaged at the time that they departed. Those images too have been retained to the present day.

In addition, Fortis retained the images of email boxes taken from two other potentially relevant individuals, images that were taken in 2008 and in 2009 in connection with another potential litigation. Those email inboxes or images from 2008 and '09 have also been retained to the present day. Those email inboxes, the ones I've mentioned, were searched in connection with the Liquidators' jurisdictional discovery, and there were 340 hits on the search of the emails that were retained.

Because this is jurisdictional discovery, what constitutes a responsive document is narrower. It relates to contacts with New York. Two emails were produced, as Mr. Margolin noted, from that review, along with three attachments. In addition to that, there were 143 additional documents deemed responsive that were also sent along. We

think that under the circumstances those steps are reasonable as we've indicated in our papers for Fortis. And we've, you know, also argued that at the very least, those steps are not indicative of the sort of intent to deprive that Mr. Margolin has noted.

If there was an intent to deprive, Fortis doesn't gather all the transactional document, preserve the shared network space, preserve the hard copies, send the hold notice to the right people three weeks after it gets notice of the litigation, and then search the email files. So that would be one example, Your Honor.

THE COURT: Okay. So just let me then address something. The Liquidators --

MR. MACKINNON: Please.

THE COURT: -- have asked the question or said that they have emails indicating that they -- there are more relevant emails that haven't been preserved.

MR. MACKINNON: That's --

THE COURT: So how --

MR. MACKINNON: That's correct.

THE COURT: -- can that be?

MR. MACKINNON: So the emails that they've cited from Fortis, a number of them are from 2004, 2005, 2006. Fortis received notice of the complaints in this case in 2011. We don't know when the emails that Mr. Margolin has

referenced from 2004, '05, and '06 were deleted. We've been -- we've looked into it, but we've been unable to identify when that happened, but the deletion could've occurred at any time between 2004, '05, and '06 when the emails were created, and 2011 at a later -- when the Defendant received notice of the complaint.

THE COURT: Well, then let me just ask you a question. Why then didn't you have someone that could possibly testify that was there in 2011 or at least go through those steps?

MR. MACKINNON: Well, we did have --

THE COURT: You're the one that chose the person to be deposed.

MR. MACKINNON: And the person who was deposed spoke to in-house counsel, spoke to a business person who was around during the period of time --

THE COURT: Did they speak to IT for God's sake?

MR. MACKINNON: Spoke to IT as well. Yeah, spoke to IT as well, and IT relayed that there were tight volume restrictions on the amount of emails that could be retained by employees at the time. This was in early 2000s. It was not unusual to have volume restrictions.

THE COURT: Well, then why didn't you present IT to be deposed?

MR. MACKINNON: We presented a witness that we

thought could bring together all the different elements. There are IT elements. They're also specific elements on how litigation holds in the work and the like, and business elements. So we presented --

THE COURT: Okay. And then where's the report that shows each person you spoke to and what they said? You're the one that set it up. Where is it?

MR. MACKINNON: We have prepared and produced summaries of the interviews that were conducted by the Rule 30(b)(6) witness, so there are summaries of her interviews with IT personnel, summaries of her interviews with in-house counsel, and summaries of her interview with the business personnel as well.

What the Liquidator says -- the Liquidators say we have withheld is a privileged document that was prepared in 2022 at the request of counsel looking into the document issues. That's the document that has been withheld from production, but we have prepared and produced the Liquidators' summaries of the interviews that were done by the 30(b)(6) witness. That's not just for Fortis, but for all of the entities. For all of the entities --

THE COURT: But you're basically telling me that the Defendant doesn't know about the 2004 emails or not because they never checked until 2022. And you have a litigation hold a long time ago. I know you sent a form

letter. You're a good firm. You sent the letter, say save this stuff, and then they had sent you some of it. So you know it's there. So I'm not understanding this.

MR. MACKINNON: Well, the documents from 2004, '05, or '06, we directed employees not to destroy any documents that they --

THE COURT: I --

MR. MACKINNON: -- may have had in 2011.

THE COURT: I assumed you did.

MR. MACKINNON: Right. In 2011.

THE COURT: I assumed you did.

MR. MACKINNON: It is the Liquidators' burden to show that documents were destroyed after the duty to preserve --

THE COURT: No, it's not. It's your burden to produce them.

MR. MACKINNON: The case law --

THE COURT: And I have shown it. Don't cross me here.

MR. MACKINNON: I don't intend to cross you, but the burden is in Pension Committee set forth --

THE COURT: You're blaming the Liquidators for emails that they don't have. They gave us the emails they had. They showed it to you.

MR. MACKINNON: I don't intend to blame the

Liquidators, Your Honor. I'm not blaming them for not -- for putting forward emails. I'm simply saying that they haven't proven those emails were destroyed after the duty to preserve attached, and that's the burden. The -- there's a burden to prove that the destruction happened after there was a duty to preserve the emails. I'm not sure if I'm explaining that --

THE COURT: No, you're not, but keep going.

MR. MACKINNON: So --

THE COURT: I'm listening to you.

MR. MACKINNON: So the --

THE COURT: We know all that. We already know all of what you just said, so keep going.

MR. MACKINNON: Okay. So as I was going to mention, we have three points that I wanted to focus on during my presentation today. The first relates to an issue that were just discussing, which is that the Liquidators have failed to show that irreplaceable ESI was destroyed after the burden or the duty to preserve attached. I think we've already covered that.

The second is the question of prejudice, and that was the focus of our -- of a lot of our briefing. We think they failed to show prejudice at this stage. And third, the Liquidators have failed to show an intent to deprive, and they need to show an intent to deprive to be entitled to the

most severe sanctions under Rule 37(e)(2). We've also argued, Your Honor, that we think the motions here are premature in the sense that we don't have a fully developed factual record. We've searched far and wide, and I'm sure the Liquidators have as well, and we've not found any cases imposing sanctions under 37(e) at the jurisdictional discovery case.

THE COURT: Okay. I have a question for you, and I have --

MR. MACKINNON: Please.

THE COURT: -- something to say about this. You haven't shown that you didn't have the 2004 emails at the time the duty attached. You're talking about --

MR. MACKINNON: Yes.

THE COURT: -- the time the duty attached, and that is the issue here. So --

MR. MACKINNON: That's the issue, yes.

THE COURT: -- what lesser sanctions would be appropriate than what he asked for?

MR. MACKINNON: So we've thought about that. Obviously we don't think any sanctions are appropriate, but I think it's (indiscernible).

THE COURT: Well, there was no one to explain why they're not here, so nobody actually explained that in all the documents I have between you and him. So what lesser

sanctions do you think might be appropriate?

MR. MACKINNON: So in the case law, we have seen sanctions in a case we cite in our briefs Cohen v. Dunne, a District of Connecticut case. One of the sanctions imposed there and in other cases as well is preventing the non-moving party, in that case -- in this case the BNPP Defendants, from challenging the authenticity of evidence that has been submitted by the other -- or obtained from third parties challenging the authenticity of these emails from Citco or Fairfield-Greenwich Group USA. That's a sanction we've seen in some of the case law.

Another sanction that we see in the case law that you might consider would be what I call the sort of total mix of the information sanction. A number of courts say that the decision maker, which in this case is Your Honor, is permitted to take into consideration that alleged spoliation as part of the total mix of information on the relevant question. Here that question is jurisdiction.

We would submit that there's no reason for a preclusion order in this particular case when it's Your Honor who's going to be making the decision on the personal jurisdiction issue. We don't think Your Honor needs the benefit of such a preclusion order. You can weigh the different arguments and evidence that have been presented and reach your own judgment.

The same really goes for the adverse inference, which we don't think's appropriate because we don't think there's been an intent to deprive. But those are the sorts of instructions that you would ordinarily see go to a jury where the jury needs to get guidance on how it should be weighing or not weighing the different evidence presented by the parties. So those two sorts of sanctions, no challenge to authenticity, total mix of the information are sanctions that we have seen in a lot of the case law that we think would be far more proportionate to what the Liquidators claim has happened here.

Some of the preclusion orders that they're seeking, for example, a preclusion order saying that we can't argue there was no due diligence done. There's just nothing in the emails for four of the five entities, nothing in any of the ESI that suggests that diligence would've been done. And we have presented evidence that diligence wasn't done by these entities, by four of the five. For Fortis, there was diligence. There was diligence, and there's no dispute about that. The documents reflect that.

But for four of the five, all they were -- what they were doing was executing transactions on the behalf of their clients and the testimony of our 30(b)(6) witnesses or witness demonstrates or indicates that they were not engaged in diligence. We don't think that that preclusion order

would be proportionate or tailored to the sorts of evidence that the Liquidators have been -- have presented.

And just on the adverse inference point, I mean, I would just emphasize that there is a very high burden that they have to meet to get an adverse inference. They have to show an intent to deprive, which is a specific intent to deprive them of evidence in this case. We would submit they've not that burden. The cases that find an intent to deprive are very different from these cases.

In re Peters, I won't go through the fact -- the facts of it now. It's in our papers. It's a case where you had a party violating multiple discovery orders, selecting specific documents that -- destroying data -- excuse me, destroying backup tapes after having been ordered by a court to retain them. Another thing about those intent-to-deprive cases is that they almost always involve a clear showing of motive and dishonesty, and that's what the court in In re Peters relied upon. Found motive, dishonesty, and repeated misconduct.

The same goes for the Mule case, which is another adverse inference or intent-to-deprive case where there was a clear motive. The court found that the single most important document in the case had been destroyed and imposed an adverse inference in that case because there were past discovery abuses as well. So we don't think the

adverse inference is appropriate given the high standard. And also the fact that that standard needs to be me by clear and convincing evidence.

THE COURT: Keep talking.

MR. MACKINNON: Okay. So look, I think we've covered a lot of the points that I wanted to make. I think we've covered -- from our perspective, the preservation record with respect to Fortis shows efforts to preserve. Maybe I'll spend just a moment on the prejudice point if you'll indulge me because the prejudice point is another important one. And also I'd like to spend a moment on when the duty to preserve attached because Mr. Margolin mentioned that it should've arisen in December of 2008. And to our mind, the duty to preserve attaches when the litigations are filed.

In that regard, I don't think there's any dispute between the parties that the duty attaches when it's reasonably foreseeable that there will be litigation. As we've explained in our papers, it wasn't reasonably foreseeable to these BNPP entities that they'd be sued until the suit was filed, which in some cases that was 2010, in other cases 2011. Why is that? The four -- go ahead, Your Honor.

THE COURT: I'm getting the impression, though, that nothing was ever preserved. Ever. So even if it

attached yesterday, you have nothing, and that's what's bothering me. Because you know, I look at my emails and I know what's in there. And -- but my IT people can tell me that -- and you're only saying that you found these two or three emails in the attachments to them in all the stuff that went through these companies.

MR. MACKINNON: For --

THE COURT: Because you spoiled them. Let's be honest about that. Okay.

MR. MACKINNON: For Fortis, there's 340 search term hits, not two. There's two that have been produced at this stage. Again, just level set. We're at jurisdictional discovery. We haven't produced everything that's relevant --

THE COURT: I understand.

MR. MACKINNON: -- to the merits of the case, right? So there's 340 search term hits. For 2S -- for BNPP Luxembourg, there's 800, right? Five have been produced because, again, we're at jurisdictional discovery. So the numbers are a bit different. There's --

THE COURT: So you're also -- so your emails on communication with Sentry and everybody else because it was a foreign entity, you just didn't say all the contacts to be made showing that you have jurisdiction by making the contact.

MR. MACKINNON: Well, I think as we've argued in our papers, we don't think there's any reason to believe there were a lot of contacts between -- relating to Fairfield. The nature of these businesses, they're execution only. It's not like that -- these entities were not providing advice to clients saying you should invest in Fairfield. They weren't providing -- they weren't doing diligence on Fairfield. Four of the five entities, all they did was execute transactions.

THE COURT: But we already know the Liquidators have some. They've already been produced. You've seen those.

MR. MACKINNON: The Liquidators have produced a handful of --

THE COURT: Well --

MR. MACKINNON: -- emails.

THE COURT: -- but that shows that it happens.

MR. MACKINNON: It shows that it happened on occasion. And what we would say is most of those emails, nearly all of them, have nothing to do with the United States.

THE COURT: But you can't say there aren't any because some have already been produced from the other side.

MR. MACKINNON: But I'm not saying there aren't any. It's their burden to prove that emails were destroyed.

There -- the case (indiscernible) --

THE COURT: You said they were destroyed. Your 30(b)(6) witness said they were destroyed.

MR. MACKINNON: Our 30(b)(6) witness said we don't have these emails, the ones that the Liquidators have put forward. That is correct. We don't -- we have not retained those emails that the Liquidators have identified. We do not have any --

THE COURT: So it's pretty obvious that we can't say that they weren't preserved.

MR. MACKINNON: We can't say they were not preserved, but we can't say when they were destroyed. They have --

THE COURT: I'm telling you --

MR. MACKINNON: Yes.

THE COURT: -- a company like BPN -- BNP cannot tell you when they had a destruction of their emails? That is unconscionable to me given what I live in, in this world, and theirs is more important than probably mine because I've got 2,400 copies, and mine are all public record.

MR. MACKINNON: Yeah. I mean, I think --

THE COURT: I mean, this is just -- I'm sorry to get off on this, but this is just not logical talking.

MR. MACKINNON: Okay. I see -- the other -- the only -- the other issue I would mention is that the record

reflects that the transactions in question, the Fairfield redemptions and subscriptions, were generally carried out by facsimile, not by email. So you've got clients who were doing execution-only business where they're executing transactions on behalf of clients, and you've got the record reflecting that that was generally conducted via facsimile. As Your Honor mentioned, there are some emails. The Liquidators have put forward those emails, but we don't think there were many. We don't have any reason to believe there were many emails were related to Fairfield given the nature of the business that these different entities were invested -- or engaged in.

And I guess the other piece I would say is that on the prejudice point, when you're looking at the prejudice -- when you're thinking about the prejudice point on jurisdiction, the question is really whether these emails are probative or relevant to jurisdiction. Right. There is a later phase of the case that there will be different questions that are asked, but this phase of the case when you're trying to determine prejudice, prejudice needs to be found -- can be found only if the emails in question were relevant. And in this case, they have to be relevant, that is probative on the jurisdictional question.

THE COURT: But you can't say in all that you've discussed and all the witnesses that you've put together

that these were not destroyed after -- during the times we're talking about, that the -- in fact, we know they've been destroyed.

MR. MACKINNON: We know that they -- we know they don't exist. We don't know when they were destroyed. And on that question, we've looked into it. We can't find a technological solution to figuring out exactly when these particular emails were lost.

THE COURT: All right.

MR. MACKINNON: That's the state of the record. And maybe I would just conclude by addressing the -- a couple of points, but addressing the Liquidators' argument about timing and when this all should be decided. Our view is that the best sequencing for this question would be for the Liquidators to put in their opposition brief to our personal jurisdiction motion.

THE COURT: We're not there. Just keep moving because there -- if there wasn't a hole, then the Liquidators couldn't get this evidence. Let's just concentrate on this. You're giving me a remedy, and I'm not ready for a remedy on that yet.

MR. MACKINNON: Okay. Yeah, I was just -- okay. That's fine. I wasn't trying to give a remedy. I was just --

THE COURT: You've already said that earlier.

MR. MACKINNON: That --

THE COURT: Or your papers have said that, so I'm aware.

MR. MACKINNON: Okay. That-- that's fine. The other point that I wanted to mention is just this idea of when the duty to preserve attached --

THE COURT: Mm-hmm.

MR. MACKINNON: -- 2008 versus 2010 or '11.

THE COURT: Now, that's important. Right. Okay.

MR. MACKINNON: Okay. And the Liquidators have cited in that regard the -- a case called Odebrecht or DoubleLine v. Odebrecht, which is a case that they've cited for the general proposition that large frauds often engender litigation, right? And so when BLMIS -- when it's revealed that BLMIS is a large fraud in December of 2008, that should've put folks on notice that there be a litigation. To our mind, Odebrecht is distinguishable. There, the company that itself had engaged in the -- or allegedly engaged in the massive fraud, that's the Brazilian company Odebrecht, was found to -- you know, should've expected that there would be litigation.

The analog here is that BLMIS, once it's revealed that BLMIS is a big fraud in December of 2008, should've expected that there would be litigation related to BLMIS. But here, our clients are differently situated from

Odebrecht. Our clients have invested in a fund on behalf of their clients, and that fund is invested in BLMIS. So we don't think that Odebrecht and cases like it that speak of massive frauds engendering -- often engendering litigation would've put our clients on notice that they were going to be sued in 2008. We think that happens with the filing of the litigations in December -- excuse me, in 2010 and in 2011. I think we're --

THE COURT: Well, let me interrupt you. Didn't the --

MR. MACKINNON: Please do.

THE COURT: -- Liquidators, don't they have evidence already that BNP issued a warning to all of the BNP entities that they were involved in the Madoff Ponzi scheme?

MR. MACKINNON: So BNPP --

THE COURT: And that was in 2008.

MR. MACKINNON: The parent entity revealed or issued a press release indicating that one of its businesses or business lines had exposure to Madoff and had lost hundreds of millions of dollars as a result of Madoff. These particular entities that we're talking about are not the parent entity. See, what's missing here -- there are three other Liquidators' lawsuits against other BNPP entities. They are not before you on spoliation issues, right?

So this idea that there is some massive BNPP-wide conspiracy, three of the eight are not here. There's a reason they're not here, right? We don't have to go into that, but there's not some sort of massive BNPP conspiracy here. The entities we're talking about here are very -- are totally separate entities from the parent entity, and they're conducting very different business from what the parent entity was conducting in that press release. They're working with private --

THE COURT: Was that a press release, or was that sent to all their entities?

MR. MACKINNON: That was a press release by BNPP. It was a --

THE COURT: Okay.

MR. MACKINNON: -- it was a --

THE COURT: All right.

MR. MACKINNON: -- press release that BNPP issued. And what it announced was that BNPP had lost hundreds of millions of dollars in connection with a separate business line. But again, that's the parent entity. These entities that we're talking about here are separate entities, two of them located in Luxembourg, obviously you know in Switzerland, another in Jersey that performed --

THE COURT: Didn't BNP admit that they should've known from that point and should've not destroyed anything?

MR. MACKINNON: Well, I think it depends on which BNP, right? I mean, these are separate entities that we're talking about here that had a very limited exposure to Fairfield. And their limited exposure to Fairfield was essentially clients saying I want to invest in Fairfield, can you help me do that, and them executing a transaction. You know, not advising --

THE COURT: I didn't -- I can't ask you this question, but of course what's hanging out here in my mind is they didn't -- you mean I didn't pick up the phone and call Cleary? I mean, that is -- that does not deserve an answer.

MR. MACKINNON: Okay, but I just -- I think it is important to -- and it's -- we speak sort of loosely of BNPP, and I do as well, but in this particular case it's important to sort of bear in mind the distinctions between the different BNPPs and the different kinds of businesses that they had. I mean, I think we don't have to belabor the point here because we discuss it in our papers, but these particular entities had a very different kind of business that they -- that had exposure to Fairfield. It was essentially clients just, you know, saying I'd like to invest in Fairfield, can you help me with that.

And as a result, the amounts in controversy in these cases we're talking about are different from the

larger BNPP case. At least with respect to Securities Nominees, with respect to BGL BNPP. These are sort of exposures that have to do with private wealth management clients, as we discuss in our papers, saying can you, you know, buy me -- I want to buy some Fairfield, can you help me do that, and then just an execution. And so I know it's speculation. It sounds like speculation, but when the Liquidators say there's been -- we've lost a massive amounts of email, we've talked to our clients.

And our 30(b) -- we've talked to the business folks, we've talked to the IT personnel, as has our 30(b)(6) witness, and the response we've gotten is what emails. I mean, I know we can't prove it today. We can't prove it today, but what emails are you expecting to find? We get a call or a fax --

THE COURT: Okay, but here's a question I can ask you.

MR. MACKINNON: Yep. Please.

THE COURT: And I'm almost sure it's not attorney-client privilege in any way. What exact date did you send them the letter that they need to retain their documents?

MR. MACKINNON: It depends -- it varies with the different entities. If you'll indulge me, I can give you the exact dates. Hold on one sec. I'm sorry, Your Honor.

THE COURT: That's fine.

MR. MACKINNON: So let me talk about 2S -- BNPP 2S Luxembourg.

THE COURT: Okay.

MR. MACKINNON: We have -- actually my -- January 10, 2011; January 20, 2011; and May 31, 2011 are three different holds. As the Liquidators noted, the first two say preserve anything related in any way to BLMIS or to Madoff. And the third on May 31, 2011 says preserve anything related in any way to BLMIS, Madoff, or Fairfield.

THE COURT: Okay. And so if you said preserve it, there at least should be preserving all the emails from 2002.

MR. MACKINNON: To the extent that the --

THE COURT: Because you told them to put the hold on, on in 2011.

MR. MACKINNON: Yeah. To the extent that they had emails at that point in time, that's correct.

THE COURT: But we have -- there are no emails from 2002 produced under the 10-year retention policy --

MR. MACKINNON: No --

THE COURT: -- is what you're telling me.

MR. MACKINNON: -- 2S Luxembourg has produced emails. They produced five emails, so they have some emails, and they had -- when we did the (indiscernible) --

THE COURT: They're only -- you're telling me only

one entity and only those five documents.

MR. MACKINNON: No. For that one entity, we ran search terms. There were 800 search term hits from the relevant time period. Five of them were responsive to the document requests. So it's 800 were preserved from that time forward. I think I went over the Fortis timeline, which is, you know, March 18. They get notice of the complaint and then they send the Hold Notice April 11, 2011. So from that point forward, April 11, 2011, there should be no deletion of any emails then -- that then exist -- then existing, you know, that relate to Fairfield. And that whole notice specifically references BLMIS, Madoff, or Fairfield.

THE COURT: But they had a 10-year retention policy, and that's even without a litigation hold. So that should've been there -- those -- all those emails should've been there already, and then the litigation hold should've kept them.

MR. MACKINNON: Yeah. So it's not really a 10-year retention policy. I think the policy Mr. Margolin was referring to is probably better stated a 10-year deletion policy; that emails are deleted after 10 years, not that they have to be retained for 10 years. So there were --

THE COURT: And so you should've had all those from 2002. They should've had all those because it

shouldn't have been deleted.

MR. MACKINNON: No. No, the policy was that employees had to delete emails to stay within their volume limits. They had no obligation to retain emails for 10 years. There was no policy that said employees must retain for 10 years. I think when we're using --

THE COURT: Have you ever tried to delete one of your emails? Really delete it? Yeah, exactly.

MR. MACKINNON: Yeah.

THE COURT: Okay. Go right ahead. Keep --

MR. MACKINNON: No, it was a 10-year deletion policy, which means that after 10 years, to the extent that there was such a policy, the emails were deleted. But employees regularly -- before the litigation hold went out, the record reflects that employees regularly had to delete emails to stay within their volume limits. They had very strict volume limits.

And the emails were not backed up. So for -- I don't know if it's helpful, but for BGL BNPP, in terms of the Hold Notices, they go out August 2010, January 2011, May 2011, and June 2011. And the first two are BLMIS or Madoff, the last two reference BLMIS, Madoff, or Fairfield. And so yes, anything that was in the possession of BGL BNPP as of that point in time that had not previously been deleted was subject to retention.

Suisse, the hold goes out, the first one in May 2011, and then BNPP Securities Nominees, the hold was sent out too late. It was in October 2013. And so -- I mean, maybe I'll just -- unless Your Honor has any further questions, I can just wrap up and just --

THE COURT: Please.

MR. MACKINNON: I can just say that I -- the key points from our perspective are prejudice. They -- at this point in time, there is no basis to find that they've been prejudiced by the loss of ESI because the emails that they've cited do not show jurisdictionally relevant contact. We can have a different prejudice discussion I think at a later point when we're talking about merits, but the prejudice here is related to jurisdiction.

And then we would just say no, no intent to deprive. The intent to deprive cases are very different, involve much more egregious conduct. Usually it's repeated discovery failures, and usually there's a clear showing of motive that we don't see in this case. And I would wrap it up there unless you have any other questions.

THE COURT: I do not. Thank you.

MR. MACKINNON: Thank you very much, Judge.

THE COURT: Thank you.

MR. MARGOLIN: Your Honor, may I make a couple of brief responses?

THE COURT: Certainly.

MR. MARGOLIN: Thank you. I think it's really significant to understand what Mr. MacKinnon did not address in his presentation, right? And this is the same as their opposition brief here. There's no explanation offered for the delay in sending litigation holds. There's no explanation offered for sending litigation holds to anything but the full set of custodians that should've received them. There's no explanation here for not suspending deletion policies. There's no explanation for not knowing what happened to ESI when there was a corporate merger.

And that's incredibly telling, but what we did hear from Mr. MacKinnon I think is generously described as attorney testimony, and in many instances goes well beyond what their own 30(b)(6) witness was able to testify. They have perpetuated this myth that these entities were "execution only". And I addressed in my opening statement here that that is not supported by the minimal documents that we found. And the only way to demonstrate that would be to look at the spoliated materials.

This myth of execution only, it is false, and it is a fabrication. And if you take a look at who Ms. Getvan, the 30(b)(6) witness, spoke to, to make this understanding that that's how the business operated, in most instances people that she spoke to, she either didn't know if they

were at the business in the relevant period, or affirmatively knew that they weren't. She spoke to very few percipient witnesses. In fact, if you take a look at the testimony summaries that Mr. MacKinnon and Cleary provided before each deposition, they reflect a number of conversations that the witness herself said she couldn't make. So these are conversations that Mr. MacKinnon and his team had with various witnesses at different BNP entities that Ms. Getvan didn't even attend.

And so what we have really heard again is Mr. MacKinnon's I think very generous spin on the facts here, and the record does not support it. And this myth of execution only is key to the argument that they should not have been on notice in 2008, and that somehow they're different from the party in DoubleLine, but that's just not the case.

What we are talking about here are entities that withdrew, they redeemed funds from the biggest Ponzi scheme in history, and these are sophisticated financial entities. And what their counsel is saying is that despite taking money directly from those -- from the funds, they should not have been on notice of the potential for litigation despite a press release, which Your Honor properly points out that noted the risk to BNP that they should not have been on notice. That's not credible, and we shouldn't believe it.

I think my final point here is on the argument that Mr. MacKinnon made on intent. What the law requires here is that we demonstrate a conscious disregard. And what he said is we don't think that they've shown a repeated discovery failures. I think the record here shows anything but. Each one of these five entities committed serial failures in preserving documents, and there is not a single explanation that Mr. MacKinnon or Cleary or BNP or the 30(b)(6) witness or anybody else they'd like to conjure has offered for any of that, and that's the record that we have right now. And we think that that justifies not just a preclusion order, but an adverse inference. I have nothing further, Your Honor.

THE COURT: Thank you. Anyone else wish to be heard? Yes, sir.

MR. MACKINNON: No, Your Honor. Thank you very much.

THE COURT: Okay. We're going to take a -- let's take a two-hour break and we'll come back same Zoom, same everything. So just come back then.

MR. MARGOLIN: So Your Honor, to be clear, 1:15?

THE COURT: That's perfect. Thank you.

MR. MARGOLIN: And that's going to be for the BIL argument? Just so I can coordinate with my colleagues.

THE COURT: Oh, I got -- I forgot that one. Okay.

Hold me -- all right. Time out. Everybody on that, we're going to come back in two hours. Let's go to the other one. What case are we calling now?

MR. MARGOLIN: I'm going to turn it over to my colleague David Flugman.

THE COURT: And I apologize for being focused on one issue.

MR. MARGOLIN: Not at all.

THE COURT: Because it was fun.

MR. FLUGMAN: Your Honor, can you hear me clearly?

THE COURT: Not really. You've still got that echo.

MR. FLUGMAN: Okay, Your Honor. I'm going to switch to my partner's computer.

THE COURT: Would you please?

MR. FLUGMAN: Your Honor, can you hear me clearly now?

THE COURT: Yes, please.

MR. FLUGMAN: Thank you. Thank you.

THE COURT: Hold on. Let me find the case number on this one. What you've got is -- your partner's microphone is making an echo. At least that's what IT's telling me when you're in the other room. This is 10-3635 (indiscernible).

MR. FLUGMAN: Yes, Your Honor. And 10-3636. The

two are consolidated.

THE COURT: Thank you so much. Now then, move forward. And those are Fairfield Sentry Liquidation v. ABN AMRO Suisse AG and Fairfield Sentry ABN AMRO Suisse AG, two different cases. Very good. Thank you very much. And I apologize. State your name and affiliation.

MR. FLUGMAN: No problem, Your Honor. Good morning. My name is David Flugman. I am from Selendy Gay Elsberg on behalf of the Liquidators Ken Krys and Greg Mitchell.

THE COURT: (Indiscernible).

MR. FLUGMAN: I will be addressing the Liquidators' Motion for Rule 37(e) Sanctions against Banque Internationale A Luxembourg, who I will refer to this morning as BIL. Your Honor, you just heard my colleague Mr. Margolin lay out the many legal failings that support sanctions against the BNP entities. As I will detail for the Court now, the deposition testimony that the Liquidators obtained from BIL establishes that BIL committed most, if not all, of the same types of failings.

And Your Honor, in a moment, I will walk the Court through the undisputed facts, but there are two things that I'd like to highlight for the Court right up front. As of today, BIL has no electronically stored information relevant to the redemption the Liquidators are seeking to recover

here. And second, BIL continued to destroy electronically stored information belonging to relevant custodians throughout the time that this case has been pending, including for one key custodian in late 2021 after the Liquidators served their discovery requests and while Your Honor was presiding over these cases.

Your Honor, these facts are quite troubling, and they warrant sanctions in this case in the same two forms that the Liquidators are seeking against the BNP entities. They warrant a preclusion order because the Liquidators have been prejudiced by BIL's spoliation of evidence bearing directly on their jurisdictional contacts with the United States, and they also warrant an adverse inference in the form described by my colleague the facts show that BIL has acted with a conscious disregard towards its preservation obligations that amount to an intent to deprive the Liquidators of the evidence that it spoliated.

Your Honor, there are a dozen key facts here that are undisputed that more than support the awarding of sanctions in this case against BIL. First, BIL knew that Madoff collapsed in December 2008, and it immediately sought legal counsel in the aftermath. Second, BIL created what it describes as a "Madoff task force" shortly thereafter for the purpose of collecting and safeguarding information at the bank relating to several of BIL's investments in Madoff

feeder funds, but not Fairfield.

Third, BIL concedes that it was on actual notice of these lawsuits no later than August 30, 2010. Fourth, at the time of the redemption at issue here, which was in 2007, and at the time BIL actually knew about these lawsuits in 2010, BIL had two document retention policies in place that would've preserved all relevant emails and other electronic communications for 10 years. It had a policy directing its employees to preserve all documents relating to commercial transactions like the one here for 10 years. Meaning, that each individual should've been keeping those documents, and they would've been available under ordinary circumstances until 2017.

And Your Honor, we attached a copy of that policy as Exhibit 11 to my declaration submitted in support of the Liquidators' motion. BIL also had a separate policy of automatically saving copies of every email sent to or received from a third party. Meaning, the copies would've been available until 2017 under ordinary circumstances and could've been preserved longer if BIL had acted. And BIL concedes this at Page 17 of their opposition brief.

Fifth, Your Honor, in September 2010, BIL collected the hard copy transaction file, that's its term, for the redemption at issue. And Your Honor may recall we've discussed that file with Your Honor before at a

conference in September. We attached that transcript as Exhibit 16 to my declaration. And Your Honor, the transaction file, as Your Honor may recall, is a collection of printed emails, many of which are incomplete, and other documents relating to the redemption at issue that were created at the time.

Sixth, in November 2010, nearly four months after BIL concedes that it was on actual notice of these lawsuits, and after consulting with U.S. counsel, BIL sent its one and only litigation hold directing recipients to preserve all hard copy and electronic documents relating to Fairfield.

THE COURT: Give me that exact date again, please.

MR. FLUGMAN: That was sent on November 26, 2010, Your Honor.

THE COURT: Thank you.

MR. FLUGMAN: Seventh, neither BIL nor its counsel interviewed anybody at the bank to determine who should receive the hold notice. Eighth, of the six individuals BIL has identified in its Rule 26(a) disclosures as having -- as being likely to have information relevant to this case, two of them, fully one-third, never received the hold, and thus, they never received any direction to save relevant information.

Ninth, BIL never followed up with any of the people who did receive the hold to ensure they were

complying or to actually collect documents. After BIL sent the hold in November of 2010, the first time BIL attempted to collect documents relating to these cases from anyone was in mid-2022 over 11 years later. Tenth, BIL took no steps at the institutional level, at the bank level, to ensure that documents were being preserved, such as suspending end-users' ability to delete emails. Instead, the bank shifted the entire burden on complying with the hold onto the individuals, individuals who were unfamiliar with litigation holds.

Eleventh, BIL never suspended its policy of deleting all electronically stored information for employees who left the bank, and it did that within six months of their departure. And this is critically important, Your Honor, because this policy was followed for three former employees who were listed in the Rule 26(a) disclosures who received the litigation hold but later left the bank. BIL deleted all of their electronic data, including one -- including the data for one key custodian, a gentleman by the name of Gianni Baldinucci, B-A-L-D-I-N-U-C-C-I, who was the relationship manager for the customer whose transaction is at issue here. And BIL did that, as I mentioned earlier, in late 2021, six months after he left while Your Honor was presiding over this case.

And twelfth, as I stated at the outset, BIL has no

electronic information in its possession today that is relevant to this case. Your Honor, these facts are clear in the record, and they are egregious. Under any read of the case law, which my colleague Mr. Margolin laid out, and which is equally applicable here, BIL's conduct merits sanctions. The record here shows clearly that BIL was under a duty to preserve electronically stored information, that it failed to take reasonable preservation steps to do so, and that the loss data cannot be restored or replaced.

Now, Your Honor, BIL does not even attempt to argue in its papers that its preservation steps were reasonable. Instead, it focuses argument on the first and the third elements of the test. I'm going to address those arguments in turn, and BIL's -- these arguments, as Your Honor will see, border on the absurd and should be rejected.

On the duty to preserve, Your Honor, BIL makes two arguments in its brief. First, they argue that even though they admit having actual knowledge of this lawsuit in August of 2010, that they were not sufficiently on notice of the specific redemption at issue to trigger a duty to preserve. And in fact, they said they didn't have that specific information until very recently.

Your Honor, that is not the law. All that the law requires is that a party be reasonably on notice that materials may be relevant to future litigation or future

discovery requests. And requiring the level of specificity that BIL suggests would neuter the duty to preserve. And those duties have been clear since the Zubulake case in 2003. We also cited a case CBF Industria in our papers from 2021 making that clear.

But Your Honor, even if this was the standard, even if they needed knowledge of the specific redemption at issue, there are two key facts in the record that will allow Your Honor to easily dispose of this argument. In January of 2021, the Liquidators filed an amended complaint in this action that specifies the exact redemption date amount and number of shares corresponding to the redemption that is at issue.

And Your Honor, as I mentioned earlier, in September of 2010, just a few weeks after admits it learned of this lawsuit, BIL actually collected the transaction file in hard copy for the specific redemption that's at issue. Had it looked at the file when it collected it, it would've known exactly which individuals were involved, and it could've acted to preserve information. So what more could BIL possibly have needed? Or more to the legal standard, what more would any reasonable party in BIL's position have needed?

Your Honor, the other argument BIL makes about the duty to preserve goes to scope. They argue that preserving

electronically stored information in this case was not "proportional to the needs of the case". And that's in Pages 12 to 14 of their opposition brief. Your Honor, as a matter of law, they're wrong. Courts in this circuit are clear that parties should preserve all relevant documents that are "reasonably likely to be requested in discovery". That's from the Zubulake case.

But Your Honor, again, as a matter of fact, we can look to what BIL did to show that this just a latter day excuse. We can know that because BIL's litigation hold, which we attached at Exhibit 10 to our -- to my declaration, specifically directed recipients to preserve electronically stored information. Your Honor can look at that exhibit for yourself, and you can see it in black and white. So it's clear at the time that BIL understood that preserving ESI was important and was called for in this case. The problem was it just actually failed to preserve the ESI. Any of it.

So Your Honor, turning to the third element whether the ESI could be restored or replaced, the answer is, no, it cannot. And Your Honor, it bears repeating this is not a situation where just one or two custodians' files are missing and the bank could look to other relevant individuals' files in the organization for replacements. No. Here, all of the ESI for all of the relevant custodians is gone with no back-ups.

So how does BIL respond to this? By attempting to draw a line between external and internal communications and making arguments about both. But Your Honor, the distinction that BIL tries to draw here is one that is false, and ultimately one without a difference. I'd like to start with external emails, Your Honor, those between people inside the bank and third parties.

Now, BIL concedes that these types of documents once existed, and that they would've been available to produce until at least 2017 had they been preserved. And of course, Your Honor, BIL has to concede this as we have, albeit incomplete, examples of emails like this in the hard copy transaction file. And Your Honor, we've attached the entire hard copy transaction file as Exhibit 2 to my declaration, and there are examples in there of third party emails, external emails.

So how does BIL respond? They say that there's no prejudice to the Liquidators because the emails can simply be replaced by going to third parties. Very similar argument to the one that BNP made. And Your Honor, BIL points to the fact that the Liquidators have located some versions of some communications, including some more complete versions of the printed emails found in the transaction file. And they say this is evidence that discovery is replaceable, and that's in their opposition

brief at Page 18.

Your Honor, as an initial matter, none of the meta data, like BCCs, attachments, and forwards that would accompany BIL's copies of these emails, are obtainable from third parties. And Your Honor has already recognized at previous hearings relating to this Defendant that meta data like this is important and should be preserved. But moreover, BIL's argument fails again on the law. The fact that the Liquidators have obtained some emails from third parties does not remedy the prejudice they have suffered here. It's simply as the court in the Cohen v. Dunne case we cite in our brief terms the question of "one of kind to one of degree".

Your Honor, no one can tell sitting here today that substantially all of the relevant emails could be replaced from third parties, parties who may not have preserved those emails. But Your Honor, with respect to the internal emails, emails between and among people within the bank, which are some often of the most probative emails or information in discovery, BIL concedes that they can't be replaced by going to third parties, of course. And BIL also has confirmed that there are no backup tapes or other sources at the bank from which they can be restored.

So, BIL simply asks the Court to believe that there were no internal emails for it to preserve when the

duty attaches. But here, Your Honor, BIL can't get its story straight, and its brief is contradictory. In one place in its brief at Pages 12 to 13, BIL claims that it would've been to burdensome to preserve ESI for this case. And Your Honor, they don't say it outright, but what they must mean is internal emails because external emails were being automatically preserved on a 10-year policy without any action being taken by anyone at the bank.

But Your Honor, for purposes of trying to avoid the conclusion that all of the internal electronically stored information has been lost, BIL asks the Court to believe that no internal emails in any of the six relevant custodians' accounts remained, existed, and could've been preserved when the duty to do so arose. That's at Pages 16 to 17 of their brief.

Your Honor, this is a completely implausible argument, and we know that from the testimony. We know from the deposition testimony and BIL's partial transaction file that its employees had access to and actually email throughout the relevant time period. We know that BIL employees used emails to communicate among themselves. We've attached -- there are examples of internal emails among people at the bank that were included in the printed transaction file attached as Exhibit 2 to my declaration.

We know from the deposition testimony that BIL's

document preservation policy required emails relating to clients and commercial transactions like the one here to be saved for 10 years. And Your Honor, despite the fact that BIL's corporate representative spoke to most of the relevant custodians before his testimony, he didn't actually ask them or know whether they deleted their internal emails between 2007 and 2010, which would've been, by the way, a violation of BIL's document retention policy.

So Your Honor, BIL asks this Court to speculate and then to resolve any doubts on that speculation in its favor. Your Honor, the record her provides ample evidence supporting the more plausible explanation as to why no internal emails currently exist at the bank, and that's not because six people independently deleted all their emails, but rather because BIL failed to act when it was duty bound to preserve information. In other words, because BIL spoliated.

So Your Honor, having established the three elements of a spoliation claim under Rule 37, the only remaining question for Your Honor is what form of relief to award. And as I noted at the outset, the Liquidators are seeking two forms of relief. First, a preclusion order preventing BIL from pointing to a lack of evidence in support of its personal jurisdiction motion. Your Honor, here the only argument BIL makes is that, well, the

Liquidators haven't suffered prejudice because there's no reason to believe that a significant amount of relevant information had been lost. And that's at Pages 19 to 20 of their opposition brief.

But Your Honor, you need look no further than the incomplete hodge podge of printed emails that BIL concedes are relevant to this case to conclude that relevant ESI was lost. Not just meta data like BCCs, forwards, and attachments, which are important, but entire portions of emails and an unknown quantity of communications and electronic records.

We've got some of them from third parties, but as one case described it, there's no reason to believe that that's not just the tip of the proverbial iceberg. And Your Honor, this evidence more than satisfies the Liquidators' burden to show that the destroyed evidence "plausibly suggests that the ESI would support their case". That's from the (Indiscernible) case we cite in our papers from 2019.

Your Honor, the second form of relief that we're seeking here is for an adverse inference that the spoliated ESI would've been favorable to the Liquidators in establishing personal jurisdiction over BIL. And Your Honor, I reiterate a point that my colleague made at the outset of his presentation, which is that we recognize that

an adverse inference is a serious remedy, and it's one that we do not likely come to the court requesting. But Your Honor, we think the factual record here is egregious. And the prejudice that the Liquidators have suffered is palpable. Let me give you just one example.

We attached as Exhibits 19 and 20 to my declaration in support of the Liquidators' motion email chains that were obtained from a third party demonstrating that affiliates of BIL actually travelled to New York in 2005 to meet with the Fairfield-Greenwich Group, the funds investment manager, and received diligence and other materials about Fairfield. Did those people who visited FGG in New York share what they learned about Fairfield with people at BIL? BIL's corporate representative said it was possible, but couldn't say.

But Your Honor, this is the very point. We don't know because all of the internal records at BIL have been destroyed. And these are exactly the kind of documents that go to the heart of jurisdiction, which is the issue, of course, presently before the Court. So Your Honor, what is BIL's response on this? The lone argument is that it took what it describes as "significant steps" to preserve ESI, and that those steps are inconsistent with an intent on BIL's part to deprive the Liquidators of the spoliated information.

Your Honor, respectfully, this argument is just not credible. BIL took no steps, let along significant steps, to preserve ESI apart from distributing one litigation hold to some custodians years after the duty to preserve attached that fails virtually every requirement for litigation holds set down in Zubulake and its progeny, black letter law in this circuit for nearly two decades.

Instead, Your Honor, it is clear from the record that BIL knew it had a duty to preserve, knew that that duty extended to electronic information, had capable U.S. counsel advising it, and still failed to take any reasonable steps to safeguard information that BIL subsequently destroyed. Indeed, BIL took affirmative steps along the way, including by choosing not to include Fairfield in its Madoff task force, and by choosing to destroy electronic data for departing key custodians as recently as 2021 that evidence an intent to deprive.

Your Honor, the law does not require absolute proof of intent or an adverse inference by direct evidence. Circumstantial evidence of a "conscious dereliction of a known duty" will suffice. And that's from the Mule case we cite in our papers. Your Honor, this record more than meets that standard. It's for these reasons the Liquidators respectfully request that the Court grant the relief set forth in our motion, and I'm happy to answer any questions

the Court may have.

THE COURT: Very good. Rebuttal or response?

MR. BUTLER: It's Jeff Butler from Clifford Chance representing Banque Internationale A Luxembourg. A lot of the points that I would want to make are covered in our brief and have been covered by Mr. MacKinnon, so I'll just briefly cover a few points that I want to emphasize. First, I'll ask the Court to focus on what information has actually been lost in this case. And you know, there's a lot of discussion about ESI generally, but here we're talking about emails. And it's important to bear in mind that the content of most of the relevant emails has not been lost here because the emails themselves were preserved in hard copy form in the bank's transactional files.

THE COURT: Yeah, but you don't have the meta data and all -- and who all they went to.

MR. BUTLER: Correct, Your Honor. Correct, Your Honor, but that's what we're talking about here, the meta data, not the --

THE COURT: Yes.

MR. BUTLER: -- content of the emails themselves. And so that becomes relevant, especially when you get to --

THE COURT: But you don't even know necessarily who the copies are to. So that's -- yeah. Okay. Keep talking.

MR. BUTLER: I understand. You're absolutely correct, Your Honor. We're not saying that nothing was lost. We're saying that it's a relatively limited set of electronic information, and there's a lot of other information that has been produced and is available for production in the case. Next I want to talk about the timing and the scope --

THE COURT: Excuse me. You said is available for production. It wasn't produced?

MR. BUTLER: In some cases there's information that has not been produced, Your Honor, because we're in jurisdictional discovery, and we've only produced documents relating to the --

THE COURT: Well, we're talking about jurisdictional discovery. That's what this is all about.

MR. BUTLER: Correct, Your Honor, but we haven't produced for example every single document within the bank relating to the Fairfield funds. That's because it's only (indiscernible) --

THE COURT: So you've made a determination that anything you've looked at is not on point for jurisdictional. Is that what you're saying?

MR. BUTLER: What we're saying is that there are some other -- there are, for example, other redemption from the Fairfield funds that are not at issue in this particular

Citco case, and not everything has been produced because we have focused on this particular redemption for purposes of jurisdictional discovery. So yes, Your Honor, we have produced a lot of documents relating to this specific transaction. There are potentially additional documents available to produce when we get into full, you know, discovery in this case. And there's a lot of information that was not lost.

I mean -- and Your Honor, let me just make this point. I mean, this is a case about clawing back a particular redemption that occurred in August of 2007. And when you think about, well, what would be the most relevant information for a case like this, it wouldn't necessarily be the meta data of emails or people who were involved. I mean, first and foremost, it would be the data relating to the transaction itself, which has all been preserved.

And again, I'm not trying to say that we shouldn't have preserved the meta data, Your Honor. I'm just trying to suggest that the meta data at issue on this motion is only a, you know, portion of the potentially relevant materials in this case, and it's relevant that a lot of the other potentially relevant materials have been produced.

Let me go onto the timing and the scope of the duty to preserve, and Mr. MacKinnon talked about this. I think it's -- it would be swimming against the vast majority

of precedent in the Southern District to hold that the duty arose before BIL was on notice of the particular case. So we would submit that the duty could not have arisen, that no duty arose before August 30, 2010, which is when BIL first had notice that the state court version of this case had been filed. But even then, Your Honor, for purposes --

THE COURT: Well, even then, it's going to look back 10 years or whatever.

MR. BUTLER: Well, it depends -- this motion depends on what existed at the time the duty to preserve arose.

THE COURT: Okay.

MR. BUTLER: That's why the Court would need to make a finding. We say it's no earlier than August 30th, but it could be later than August 30th as well, Your Honor. Because it's not just that the duty to preserve is an on-and-off switch that you either have the duty to preserve everything or the duty to preserve nothing. There's the concept of the scope of the duty to preserve that is in the cases under Rule 37(e).

So the Court has to make a finding not only of the timing, but also what did the duty extend to. And the Advisory Committee notes of Rule 37(e) warn against using hindsight to establish what the scope would've been. And they indicate that it's possible that a duty to preserve

exists, but the scope of that duty may be unclear. And if the scope of the duty is unclear, then the Liquidators or moving party cannot meet their burden of showing that the scope included the particular ESI that is at issue in the motion.

And that's what we're trying to suggest here. And the reason that the scope of the duty to preserve was unclear back in late 2010 is because the initial pleadings in the case were very vague about the particular redemption that involved BIL. And even when the Liquidators listed all the redemptions in the amended complaint filed in the 10-3636 action in January of 2011, bear in mind that there were 80 different Defendants in that case, and there were more than 1,500 redemption payments alleged. And there was no connection made in that complaint between the particular redemptions and the individual Defendants.

So -- and that's the 3636 case, Your Honor. In the 3635 case, there was a similar situation, but none of the redemptions correlated to anything that BIL had done, and the Liquidators concede that at this point. They don't have any claim under the 3635 case even though they've kept BIL in that case and kept BIL as a Defendant in that case.

So it's a small point, Your Honor, but I'm just trying -- the Court, in order to impose sanctions, is going to need to make certain factual findings. One of them is

the timing of the duty to preserve, and another is the scope of the duty to preserve. And because of the ambiguity of the pleadings that were filed by the Liquidator, we believe it's difficult to make a finding that the scope of the duty to preserve included the particular meta data that we're talking about on this motion.

Now, one might argue that that's a little unfair to the Liquidators because it makes them difficult to win a motion like this. But bear in mind, the Liquidators decided what to include in their complaints. They made the decision to be ambiguous about what was at issue for BIL in this case. And they should not be rewarded for being ambiguous by getting a broader duty to preserve. And that's one aspect of the reply brief that I wanted to address specifically, which is the suggestion that, hey, it may not have been clear -- this is in the reply brief of the Liquidators. I think it's at Page 7 in the last line of the carryover paragraph. There's a suggestion that, hey, if it was unclear what transaction was at issue, then BIL should've preserved everything or all the --

THE COURT: Okay. When did you start representing this client? Just what's your date on this? I just want to know that.

MR. BUTLER: For me -- for my firm, Your Honor, they started advising BIL on these issues shortly after the

collapse of BLMIS.

THE COURT: Okay. And did your firm not realize the kind of evidence you might need for personal jurisdiction?

MR. BUTLER: Well, Your Honor, I'd rather not go into what my firm and particularly the Luxembourg office of Clifford Chance might've known. I can tell you my personal involvement in the case and the New York involvement in the case did not come until much later. It was around October --

THE COURT: All I can say is we've got a sophisticated client, we've got a sophisticated lawyer or lawyers and clients. And I am sure -- I don't even -- I'm going to editorialize right here. I know your firm well. I know a lot of people in your firm well, and I know them well enough to know they're saying you've got to do this. And did no one think about meta data? I mean, I'm just -- you don't have to answer that. I've already got the answer to that.

MR. BUTLER: Thank you, Your Honor. Let me move on.

THE COURT: Because it just seems unimaginable to me. I'll just say that.

MR. BUTLER: Your Honor, and I'll leave it at that, but I will (indiscernible) --

THE COURT: You need to because I'm --

MR. BUTLER: -- the scope of the duty to preserve is evaluated based on the content of the pleadings, not based on the excellence or lack of excellence of the lawyers involved. And the pleadings in this case are not (indiscernible) --

THE COURT: This is jurisdiction we're talking about here, and the pleadings in this case is on jurisdiction. And you don't have to say preserve the meta data. That's not what the rules say. They say preserve the electronic. It's a simple scope. We're not out in the world here.

MR. BUTLER: Respectfully, Your Honor, I disagree because it's not an all-or-nothing proposition. It's not that we had a duty to preserve all the ESI for everyone in the BIL organization because this case was filed. We -- if we had a duty, it was only to preserve ESI from specific individuals who were involved in the transaction at issue. And because the transaction at issue was not made clear from the pleadings --

THE COURT: It doesn't have to be a transaction at issue. It's any of the stuff that was emailed between BLMIS and Fairfield. That's -- you're narrowing the scope, and I don't think your scope needs to be narrow.

MR. BUTLER: I understand, Your Honor, and you may

reach a different conclusion. We're just trying to make the point that in our view the scope should be crafted according to what's in the pleadings. And therefore, there's at least a possibility that the pleadings are --

THE COURT: Why not craft the scope to what's in the code and the rules? Let's just be serious here.

MR. BUTLER: I understand your point, Your Honor. Let me move on.

THE COURT: Thank you.

MR. BUTLER: the -- I think the point of prejudice was covered. I mean, clearly some ESI was lost. Clearly this meta data is not available, and the Court has the difficult challenge of deciding how that might have prejudiced the Liquidators given that the rule under (e)(1) is clear that the remedy can only be sufficient to cure the prejudice that might exist.

But I want to go onto (e)(2) and the intent element of Rule 37(e) because I think that's very important here. And it's important not only because some remedies are explicitly being sought under (e)(2), but because even the remedies that are sought under (e)(1) here, these preclusion remedies, come dangerously close to the type of remedies that are at issue under (e)(2). And I don't think it's obvious that the remedies that the Liquidators are proposing under (e)(1) are actually available absent a finding of

intent to deprive under (e)(2).

There's not a clear distinction drawn in the rule between precluding a party from making an argument and presuming a fact to be true. And if it -- if the Court enters a ruling --

THE COURT: They're not asking us to find intent. That's not been there. So...

MR. BUTLER: Well, let me go onto the --

THE COURT: Oh, they are. Excuse me. I'm all right.

MR. BUTLER: Yeah --

THE COURT: You're asking us to find intent. Okay.

MR. BUTLER: Yeah, they are, Your Honor. And I just --

THE COURT: I agree.

MR. BUTLER: -- (indiscernible) on that.

THE COURT: I said it wrong.

MR. BUTLER: Okay. Because the intent element is by design, one that is meant to be difficult to establish. I mean, Rule 37(e) was working a significant change in the case law, and it's clear that the intent requires not only an intent to delete the information, the electronic information, but a specific intent to deprive a litigant of the use of that information in a particular case.

And there are very few cases that have found that this intent element had been satisfied. And usually they're -- they arise in cases where the electronic information that's been deleted is a clear and central importance in the overall case. So you see that for example in the Moody case, which is a personal injury case arising from a railway accident. And the ESI at issue was the event recorder for the train in question. And the court said that there's no question that the lost evidence was highly relevant, if not the most relevant, information in the case.

And similarly, in the Mule v. 3-D Building case from the Eastern District of New York, you know, that was a case where it was about enforcement of an arbitral award over a defunct company. And the information that was lost was the -- all the accounting information for that company, which would show things like where payments went and where the money went that might be relevant to the case.

THE COURT: That's relevant to this case, don't you think?

MR. BUTLER: No, Your Honor, because --

THE COURT: Where the money went isn't?

MR. BUTLER: -- we're talking about the meta data. We're talking about the meta data from emails where we know the content of the emails. And I don't think -- personally, I don't think anyone would've said looking at this case, a

clawback action for one redemption in 2007, that meta data for a -- from emails would be particularly important or dispositive in a case like this. That's the point that I'm trying to make. And the fact is that many other cases, particularly cases in the Southern District, which have been cited in the papers, where the court has found that there's not sufficient evidence of intent, they arose in situations where maybe there was repeated conduct, maybe there was egregious conduct, maybe there was negligence, or even gross negligence. But the courts have found that the information at issue is not so important that an inference can be drawn.

THE COURT: So all the carbon copies, all the CCs and everything, that's not -- you're saying that's not important either?

MR. BUTLER: There's no --

THE COURT: I mean, you're saying that.

MR. BUTLER: There's no reason to think that it'd be particularly important, Your Honor. I mean, there are a lot of cases where meta data doesn't --

THE COURT: It's not -- you're saying that, but we don't have it to know that. Okay. Go ahead.

MR. BUTLER: And I think if there's a presumption that we have to show -- I mean, it's our burden to show that these would not be relevant in the case, I agree with Your Honor we probably would lose that motion here. But that's

not the law. The law is that the Liquidators have the burden to show an intent to deprive, and they have to show that by clear and convincing evidence. And what I'm arguing is that the nature of the lost information here is not such that the Court can easily conclude that it was deleted for the specific purpose of depriving the Liquidators of it in this case.

And it also would make no sense that BIL preserved so much other information like the content of the most relevant emails, and the transactions files, and the transaction-related information if they were really trying to deprive the Liquidators of relevant information. And it's for that reason, Your Honor, we're not saying that everything was done perfectly in this case, but I do think what was done was a matter of at most negligence and not intent. And there certainly was not an intent, or there's not evidence of intent in this case, to deprive the Liquidators of this meta data because of its perceived significance in this case.

THE COURT: Well, then I have a question to ask you, the same question I asked Mr. MacKinnon. What's the appropriate remedy then in your mind?

MR. BUTLER: Well, Your Honor, I don't have --

THE COURT: There needs to be a remedy, because it ain't there.

MR. BUTLER: I'm sorry, Your Honor?

THE COURT: Never mind. Go ahead.

MR. BUTLER: Oh, I was just going to say I don't have a clear answer. I think Mr. MacKinnon's suggestions are good ones. I think certainly the Liquidators -- I think certainly the Court can establish that meta data has been lost, and perhaps some other specific attachments or portions of emails has been lost. And certainly the Liquidators can argue, as they're doing already, that that might have some probative significance in the case. I think those are reasonable remedies.

THE COURT: We're talking about jurisdiction here. We're not talking about the rest of (indiscernible).

MR. BUTLER: I also think it would be appropriate for the Court -- if the Court is inclined to find the first four elements of Rule 37(e), it would be appropriate for the Court to defer the issue of further sanctions to see if it might -- if there might be more --

THE COURT: Oh, no. We're moving this case along. It's been here since 2010.

MR. BUTLER: I understand.

THE COURT: 2011.

MR. BUTLER: I'm not saying that no ruling should be made today, Your Honor.

THE COURT: I hear you.

MR. BUTLER: I'm just saying that another remedy would be to keep the possibility of future remedies open for the future.

THE COURT: Yes. Anything else anybody wishes to add?

MR. FLUGMAN: Your Honor, may I make a few points in rebuttal to Mr. Butler?

THE COURT: Certainly.

MR. FLUGMAN: So Your Honor, I'd like to start where Mr. Butler started to kind of chip away a little bit at the end of his presentation, which is the idea that all that's been lost here is meta data. It most certainly is not.

THE COURT: (Indiscernible).

MR. FLUGMAN: Right? So just to be clear, the transaction file, which was created in 2007 by printing off portions of documents that people at the time thought might be relevant for one purpose, does not answer the question of what relevant information should've been preserved. And if you look, Your Honor, in Exhibit 2 to my declaration, which lays out the -- which is the entire transaction file, you will see portions of emails that are clearly cut off, attachments that are missing, and other -- you know, other portions of things that have not been preserved, let alone the fact that we have shown emails that are just lost at BIL

that we have obtained from third parties, which show jurisdictionally relevant contacts, such as receipt and requesting of offering memoranda from Fairfield Sentry.

Those are attached as Exhibits 3 and 4 to my declaration, correspondence with FGG, that's at Exhibit 5 and Exhibit 8 of my declaration, and the potential visit by Dexia Asset Management to New York that I mentioned in my presentation earlier at Exhibits 19 and 20. So I just don't think there's any way that Mr. Butler can say that all that's been lost is meta data.

With respect to the scope of duty point, I don't think this bears a lot of time because I laid it out in my opening presentation, but Your Honor, Mr. Butler pointed out a comment by the working group and the Advisory Committee that says you shouldn't look at this with hindsight. I couldn't agree more. You can look at exactly what BIL did at the time, which is collect the transaction file within weeks after receiving the complaint that merely stated the nature of this -- or the summons -- notice and summons, rather, that merely stated the nature of this action, and from that transaction file could've easily identified the people who were involved and preserved their information.

And then with respect to the amended complaint filed in January 2011, the fact that there were many transactions listed I don't think is a panacea here. BIL

had the information about its Fairfield transactions and easily could've identified what was at issue in those cases. So I think the scope of duty doesn't hold much water. I think the proper place to look is in the litigation hold itself, which is broad as it should've been. The only problem is they didn't actually preserve the data.

Your Honor, with respect to the 3635 action, briefly, we have not conceded we don't have a claim in that case. We've sued BIL in that case in good faith, and that case is -- has a personal jurisdiction motion filed by BIL in it, and we are going to be responding to that in course. And finally, on the point about 37(e)(2) and intent, what I heard Mr. Butler say is that, you know, you basically need to show direct evidence of intent. That is not the law. There are many cases that we have cited in our papers elucidating the proposition that you can show intent for a 37(e)(2) remedy by circumstantial evidence.

The Moody case, the Mule case, the Petters case, and again, I remind the Court where I began, which is this is not a case where there are gaps here and there where content can be recreated by going to other custodians. This is a case where there is no ESI available at all. And I just -- I'm somewhat flabbergasted by the idea that Mr. Butler can say that all of the relevant content has been preserved in the one transaction file that we have. And in

reality, there is no way to know the scope of what was lost, although we do have some ideas from what we have in the record. And unless Your Honor has anymore questions, I'll rest.

THE COURT: I do not. Does anyone else wish to be heard?

MR. BUTLER: No, Your Honor. Thank you very much.

THE COURT: Adjournment time is now delayed until 2:30. We will reconvene at 2:30 same Zoom, same number, same passcode.

MR. BUTLER: Thank you, Your Honor.

THE COURT: Thank you. Chambers.

(Recess)

THE COURT: Good afternoon. The only thing I have to add before I read the opinion, because we're going to put an opinion on the record today, so we're going to -- I'm doing a bench ruling, does anyone have anything they wish to add? Thirty seconds or less. I hear no takers on it. Okay.

First, I just want to be very clear. Today's ruling is primarily based on all the filed pleadings with the accompanying exhibits. That being said, I think all of you were articulate, and I tried to pay very close attention to what you were saying even though I interrupted you a bit. But I still paid close attention to what you were saying.

And we're in Fairfield Sentry v. BGL BNP Paribas SA, and that's 10-03626, Fairfield Sentry v. BNP Paribas Security Services Luxembourg 10-03627. And I know we have two separate issues on -- or two separate Defendants on Fairfield Sentry Liquidation ABN AMRO Suisse AG, 10-03635; Fairfield ABN AMRO Suisse AG, 10-03636; Fairfield v. BNP Paribas Securities Nominees, 11-01579; Fairfield Sentry BNP Paribas Fortis, 11-01617. For the record, would you please again put your name on the record since this is a little bit separate from the other one? Anybody? Everybody?

MR. MARGOLIN: Your Honor, this is Joshua Margolin from Selendy Gay Elsberg on behalf of the Liquidators Ken Krys and Greg Mitchell.

MR. MACKINNON: And Your Honor, this is Ari MacKinnon at Cleary Gottlieb Steen and Hamilton on behalf of the BNPP entities that you mentioned.

THE COURT: You're on mute, Mr. -- I'm not calling your name.

MR. FLUGMAN: Your Honor, can you hear me?

THE COURT: Yeah. You're still on mute. I can't hear you.

MR. ELSBERG: Your Honor, this is David Elsberg. My colleague's name is David Flugman whose volume is not working right now.

THE COURT: Okay. Thank you. That's the computer

that -- I see the background that you all are in the same room. Very good. And Mr. Butler?

MR. BUTLER: Your Honor, it's Jeff Butler from Clifford Chance representing Banque Internationale A Luxembourg in the 10-3635 and 10-3636 actions.

THE COURT: Thank you. Okay. The Liquidators have filed motions against the Defendants seeking sanctions for spoliation of evidence relating to personal jurisdiction, an issue which is currently pending before this Court. Different reasons are asserted against different Defendants.

First, I want to address the motion to seal. The parties have made a joint request to seal the motions and response papers. The motions for sanctions contain documents designated as confidential by third parties under the protective orders. Pursuant to the protective orders, the deposition transcript is presumably treated as confidential for the latter of a period of 30 days after a final transcript of the deposition in the action is received by counsel of each of the parties or the date by which any review by the witness and statement of changes to this transcript are to be completed under the applicable rules. And of course, you can extend that by agreement.

The period during which the deposition transcript was to be treated as presumptively confidential expired on

January the 23, 2023 without either party designating any portion of the transcript confidential. The Court is granting the Motion to Seal the Sanctions Motions Exhibit and Responses for a period of two years. That being said, I will advise you that none of the Court's decision will be redacted or sealed, and it may refer to the evidence provided if necessary to divide this spoliation motion. So I grant that.

10-03626 BGL BNP Paribas, S.A. In February of 2010, BGL BNP became the major stakeholder in BNP Paribas Luxembourg -- and like you, I like to put in abbreviations, but I'll try to say Luxembourg at least -- BNPP Luxe, which received 1.8 million from Sentry and Sigma, and those were the funds. In June of 2010, the Liquidators sued BGL BNP to claw back redemption payments made to BNPP Luxembourg from the funds. In October of 2010, BNPP Luxembourg transferred its business activities to BGL BNP Paribas, and BGL BNP does not possess any electronically stored information referred to the parties of electronically stored information. You did that in your papers from the relevant period.

I will tell you all I just got sick a while ago, so I'm going to be slow. So just be patient with me.

The Liquidators argue that BGL BNP failed to preserve this electronically stored information from BNPP Luxembourg either at the time of transfer or some later

time. In their motion, the Liquidators argue that they were aware of certain electronic stored information that is relevant to personal jurisdiction from third party discovery, and that includes a BNPP Luxembourg employee emailed Sysco Fund Services, the funds administrator, on September the 12th, 2006 instructing it to wire BNPP Luxembourg's redemption payments to BNPP Luxembourg's U.S. correspondent account at BNP Paribas New York.

Citco Funds Services emailed BNPP Luxe employees Sentry's private placement memorandum, which explained U.S. base BLMIS acted as custodian of Sentry's assets and had approximately 95 percent of Sentry's assets under its custody. These emails could not be produced by BGL BNP in their searches. Liquidators claim this demonstrates a failure to preserve.

Liquidators also argue that BGL BNP and BNPP Luxembourg knew that BLMIS' collapse at least as early -- knew about BLMIS' collapse as -- at least as early as December the 14th, 2008 when their parent company BNP Paribas Group published a press release referring -- referencing the Madoff fraud and stating that many BNP entities were exposed to this fraud through their trading business. The Liquidators provided evidence that the Defendant believes "that it has probably become common knowledge that the SEC had charged Madoff with running a

Ponzi scheme on or around the date of the press release."

The Liquidators also provided evidence that BGL BNP retained Cleary to represent it on July 2, 2010 in this liquidation proceeding. No liquidation hold regarding BNPP Luxembourg's investments with the funds was issued until August the 24th, 2010 when one employee was advised. BGL BNP also issued a litigation hold to in-house counsel and limited non-legal employees -- and to limited non-legal employees on January the 10th 2011, and another only to in-house counsel on May the 25th, 2011. Other than the one employee who had received the August 24, 2010 hold, neither the January 10, 2011 nor the May 25, 2011 hold reached additional employees among the 35 employees that BGL BNP determined to be the most likely to possess relevant information.

According to the motion, 34 out of the 35 employees that BGL BNP determined were most likely to possess relevance evidence received no litigation hold to preserve documents until May or June 2011, almost three years after the BLMIS collapse and a full year after BGL BNP was sued in this action.

Additionally, none of the litigation holds specified what documents employees should save as potentially relevant. BGL BNP never audited compliance with the holds, never imaged electronically stored information

possessed by the hold recipients, and never supervised employees' attempt to comply with the hold instructions. The Liquidators also argued that there were no preservation policies for emails, and instead, employees had discretion over what emails were saved or deleted. Once deleted, emails were lost permanently. When employees left BGL BNP, their email accounts were disposed of within 90 days and any archived emails, as in archived by the employees, were deleted after 10 years. The 10-year deletion policy is a companywide policy at BGL BNP for corporate email. The policy was never suspended.

The Liquidators also argue that BGL BNP failed to disclose that there was no electronic information storage policy in place until December of 2022 despite there having been a Rule 26(f) hearing before this Court on October the 5th, 2021 over a year earlier. They also argue that the witness Ms. Stephanie (Indiscernible), who had -- I don't think I pronounced that right -- who was deposed regarding the company's corporate policies on electronic retention, was completely unfamiliar with the company's policy and was unsure why she was the designated person.

She's a lawyer at BNP Paribas RCC in New York, and was designated for all five Rule 30(b)(6) depositions taken of the BNP Paribas Defendants in the U.S. Redeemer action, and all five of those are European entities. Ms. Getvan

appeared at the deposition completely unprepared to establish a chain of custody over electronically stored information relevant to this litigation, and I will quote from her deposition. "All I can say is we don't know what happened to the emails, right? We don't know if they were deleted in the ordinary course of business. We don't know if the BNL emails were transferred to BNPPL, and we don't know if the BNPPL emails were transferred to BGL BNP. We just don't know."

In opposition to the motion, BGL BNP argues that the Liquidators have not been prejudiced by the lack of evidence in prosecuting its case. Ironically, in the same breath BGL BNP argues that the Liquidators lack evidence that BGL BNP possess relevant electronically stored information at the time that duty to preserve arose. Defendants argue that sanctions sought by the Liquidators are not proportionate to the harm, that they did not purposely fail to preserve evidence, and the sanctions were not appropriate before discovery on the merit has even taken place.

10-03627 BPL Securities Services Luxembourg. Liquidators have requested that the Court sanctions BPL Paribas Securities Services Luxembourg for similar reasons. Liquidators state that no emails were preserved for 15 of the 31 potential custodians identified in BPL SLL for the

relevant period in question. That's 2002 through 2008. And from the 16 custodians that did have archived email and of an unknown quantity, no relevant emails were found unless -- these were the ones where you said you found 800, correct, and only five were relevant, Mr. Butler? I just want to make sure the record's correct.

MR. MACKINNON: That was me, Your Honor. Correct. It was 800 search term --

THE COURT: Oh, I'm sorry.

MR. MACKINNON: Mr. MacKinnon, yeah, but --

THE COURT: Thank you.

MR. MACKINNON: -- 800 search term hits.

THE COURT: Thank you. These five emails were received within a 25-day period from August the 28th to September the 21st, 2007. BNP SSL did not have a litigation hold until two years after Madoff's scheme was revealed, and seven months after this adversary proceeding was filed. That litigation hold was distributed to only 2 of 31 individuals identified as custodians. BNP SSL allegedly never followed up with the employees about the hold, never collected emails for preservation, and never disabled any employees' ability to delete emails.

The BNP SSL corporate representative was unable to answer any questions regarding the retention policy at the deposition. Liquidators point out that Defendants' U.S.

counsel was also derelict in not directing its client to preserve electronic data for litigation. Defendants argue that the Liquidators are not prejudiced by the lack of, that BNP SSL did not know it had to preserve evidence during the relevant timeframe from 2002 to 2008, and that they produced five electric emails demonstrating that they did preserve emails. They also argued that they provided many hard copies of evidence that has been turned over.

10-03636, and this is the 06 -- wait a minute. That's this one. That is the ANB AMRO Suisse AG, am I correct? And it has two Defendants, and this is one of them. The Liquidators argue that BNP Paribas Suisse, and that's also BNP Paribas Suisse SA Private BNP Suisse failed to preserve disks. BNP Suisse has used the terms CD, CD-ROMs, and DVDs to refer to the disk on which the former employees' emails were imaged containing the emails of departing employees 10 years after their creation. BNP Suisse admits that it received a hard drive of electronic information for employees of Fortis Suisse, which it is unable to locate.

Based on this, Liquidators argue that BNP Suisse has spoliation 22 out of the 27 former employees on its custodian list. Liquidators know from third-party discovery that BNP Suisse once had electronically stored information, including emails documenting activities relevant to the

personal jurisdiction inquiry, like emails two New York based FGG. Those electronic communications no longer exist, and as a result, BNP Suisse has produced no emails in this litigation. BNP Suisse argues that it produced all evidence relevant to personal jurisdiction, including 1,453 pages of responsive documents consisting of account statements, NAV statements, subscription agreements, cash transfers, trade requests and tickets, trade confirmations, faxes regarding redemption in Fairfield.

BNP Suisse argues that Liquidators have failed to prove that the evidence was lost or destroyed after the duty to preserve it attached. It argues that it took substantial steps to preserve documents relating to the subscriptions and redemption at issue, including sending documents to outside counsel for safekeeping and preserving digital repositories of client account information, and retaining disks of emails of former employees. BNP Suisse also argues that the Liquidators are not prejudiced by the lack of evidence, and the Liquidators' requested sanction is the harshest available sanctions.

11-01579 BNP Securities Nominee. Liquidators bring a motion seeking sanctions against BNP Securities Nominee Limited, also known as Carrier Holdings Limited LCAM BNP Sit. Nom. as referred to earlier in the arguments for spoliation. According to the motion, all email data is in

the -- in its possession was destroyed pursuant to its 10-year retention policy. BNP Securities Nominees has no employees and no email system of its own. Instead, it acted through its affiliate BNP Securities Services of New Jersey who was the administrator for the investment fund. On October -- in October 2013, BNP Securities Nominee sent a litigation hold to two people, neither of whom were custodian or likely to have possessed relevant information for this case. The hold stated that all normal document retention policies were being suspended. They were never suspended.

As early as 2008, BNP New Jersey had instructed employees to preserve documents, including emails for 10 years at which point they could manually delete them in 2013, long after BNP Securities Nominee had actual notice of this litigation. BNP New Jersey installed a new system that automatically deleted emails 10 years after they were sent or received. No employee of BNP New Jersey was ever advised not to manually delete emails, and BNP New Jersey never modified its automatic deletion policies.

The Liquidators know from third-party documents that BNP Securities Nominee and BNP New Jersey once possessed emails documenting activities directly relevant to this jurisdictional inquiry. BNP Securities Nominee opposes the motion. It argues that the subscription at issue in

this complaint were entered into when the Royal Bank of Scotland International, RBS, was the nominee. BNP Securities Nominee did not exist at the time the subscription agreements were entered. It acquired the BRBS business line in June of 2007, and did not acquire the Legacy emails of RBS employees who transferred to BNP Securities Nominee.

There are two redemptions in question here that occurred in November 2007 when BNP Securities Nominee was the acting nominee. It argues that there have been no emails generated regarding those redemptions, and there was no basis to determine that BNP Securities Nominee possessed the information at the time that the duty to preserve attached. It argues that these emails might have been deleted prior to the complaint being filed in this action or prior to 2008.

11-016 -- excuse me. I keep saying New Jersey. That is my mistake. It is just Jersey. It has been brought to my attention, and I apologize for the error.

This is Fairfield v. BNP Fortis. Liquidators seek sanctions for spoliation against Fortis Bank SA/NV also known as BNP Paribas Fortis. Until March 2022, Fortis employees were able to delete any evidence related to this case without oversight. This is true for employees who were -- previously received a litigation hold in 2011. That

litigation hold stated that normal retention policies were suspended, but in practice nothing changes. Fortis has turned over two emails and three attachments in relation to the jurisdictional inquiry in this case. Neither of the emails are from a time when Fortis invested in Sentry.

Liquidators have emails from third parties that indicate that they have more relevant emails that have not been preserved. Those emails show Fortis had done diligence on Sentry and Bernie L. Madoff Securities, LLC, and visited Sentry's investment manager Fairfield-Greenwich Group in New York. Fortis allegedly audited its litigation hold earlier this year, and therefore knows when the documents were deleted. That has not been presented to me, and it refuses to provide the outcome of this audit to the Liquidators.

Fortis waited more than 28 months after the revelation of Madoff's fraud from December 2008 to April 2011 to issue its first litigation hold in relation to BLMIS or Sentry. When the hold was finally circulated, BNP Fortis improperly relied on the recipients to implement the hold with no assurance that the recipients had read the hold or would comply. No follow-up and no attempt to collect any of the electronic stored information those employees might have possessed. The Liquidators argue that Fortis knew how to preserve electronic data for litigation. It has -- it had previously imaged -- backed up the live email inboxes of

employees in anticipation of other litigation, but chose not to do so here.

Fortis had no automatic deletion policies or any accidental data loss. As such, the Liquidators argue that the loss of data was intentional. Fortis opposes the motion. It makes the same arguments as the other Defendants have, including that there was no evidence as to whether the information was deleted prior to its duty to preserve arising. Fortis argues that it took substantial steps to preserve documents related to this litigation. It has preserved hard copies of the images in the email boxes of five employees who departed Fortis. Fortis also argues that the lack of evidence does not prejudice the Liquidators.

Rule 37(e) of the Federal Rules of Civil Procedure governs a party's failure to preserve electronically stored information. Rule 37(e) states if electronically stored information that should've been preserved in the anticipated or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court upon finding -- one, upon finding prejudice to another party from the loss of the information may order measures no greater than necessary to cure the prejudice; or two, only upon finding that the party in acted with the intent to deprive another party of the informations used in the

litigation may, A, presume that the lost information was unfavorable to the party; B, presume the information was unfavorable to the party -- I left out the jury part -- and C, dismiss the action or enter a default.

It is clear from the evidence presented with these motions that the Defendants have failed to preserve emails. "It is not sufficient to notify all employees of a litigation hold and expect the party will retain and produce all relevant information." That's Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004). Rather, a party "must identify all sources of potential relevant evidence and implement a litigation hold by suspending any routine document destruction or other process involved in the ordinary course of business that might result in the destruction of potentially relevant evidence." Skyline Steel, LLC v. PilePro, LLC, 101 F. Supp. 3d 394 (S.D.N.Y. 2015).

Again, "Where a party fails to timely institute a formal litigation hold, the court can conclude that it did not undertake reasonable steps to preserve electronically stored information." Europe v. Equinox Holdings, Inc., 592 F. Supp. 3d 167 (S.D.N.Y. 2022). The Liquidators ask this Court to preclude the Defendants from disputing personal jurisdiction on the basis of emails. While a court has broad discretion in crafting a sanctions for spoliation of

evidence, the sanctions, and I again quote, "Should be designed to, one, deter parties from engaging in spoliation; two, place the risk of an erroneous judgment on the party who wrongfully created the risk; and three, restore the prejudiced party to the same position it would have been in absent the wrong destruction of evidence by the opposing party." That's West v. Goodyear Tire and Rubber, 167 F.3d 776 (2nd Circuit 1999).

Precluding the Defendants from disputing personal jurisdiction is entirely akin to a default judgment being entered against them on this issue. The Second Circuit has stated that dismissal of an action should only be imposed where there is a showing of willfulness, bad faith, or fault on the part of the sanctioned party. Absent these, the courts are encouraged to craft sanctions such as instructing a jury that certain fact is found precluding a party from introducing evidence on a particular issue or preventing a witness from testifying about the spoliation evidence.

It is well-established and a longstanding principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party for its destruction. And that is a quote from Kronish v. United States, 150 F.3d 112 (2nd Cir. 1998).

And again I quote, "In order for an adverse

inference to arise from the destruction of the evidence, the party having control over the evidence must have had an obligation to preserve it at the time it was destroyed. This obligation to preserve evidence arises when the party has noticed that the evidence is relevant to litigation, most commonly when the suit has already been filed providing the parties responsible for the destruction -- providing the party responsible for the destruction with express notice, but also on occasion of other circumstances. As for example, when a party should have known that the evidence may be relevant to future litigation." And that is from Kronish, and that is a quote.

Another quote from the same source, "Once a court has concluded that the party was under an obligation to preserve the evidence that it destroyed, it must then consider whether the evidence was intentionally destroyed and the likely contents of that evidence." And that's -- again I quote, "Intent is really proven by direct evidence." As such -- and that's the end of that quote, and begin, as such courts have "substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witness in a particular case, and other factors. In considering these factors, courts may look to how the party acted throughout the litigation and during discovery disputes, including whether there is a

credible explanation of the parties' failure to preserve relevant electronically stored information." In re Petters Company, 606 B.R. 803 (Bankr. D. Minn. 2019).

Resisting the urge to say something about your 30(b)(6) witness, of course the Court cannot hold the prejudiced party too strict a standard regarding the likely outcomes of the destroyed evidence as doing so would "subvert the prophylactic and punitive purpose of the adverse inference, and would allow parties who have intentionally destroyed evidence to profit from that destruction."

The Second Circuit has stated, "The level of proof that will suffice to support an inference in favor of the innocent party on a particular issue must be less than the amount that would suffice to survive summary judgment on that issue. Otherwise, innocent parties meant to benefit from the adverse inference against offending parties would receive no benefit at all having been deprived of the evidence that may have been crucial to making their case, yet being held to precisely the same standard of proof before they may present their case to a jury." And that's back to the Petters case.

The Liquidators are only seeking to preclude the Defendants from entering evidence of what was in the emails, and this remedy is more than fair. Here the Liquidators

have met their burden of demonstrating they've been prejudiced by the loss of the evidence. The Liquidators have provided copies of emails that they received from third parties demonstrating there was at least some relevant information that has been lost. They have also met their burden of demonstrating that the lost evidence in question likely would have contained relevant evidence regarding personal jurisdiction because the emails that they have obtained from third parties are relevant to the issue. It is possible that additional similar or more relevant information existed and was lost.

As to the Defendant's duty to preserve, it is clear that they were all on notice of their duty to preserve at least as early as when this case was filed though the case can be made to say their duty to preserve arose at the time that Bernie Madoff was arrested. Even if the duty did not arise until these complaints were filed against them, the Liquidators have provided evidence that the Defendants utterly failed to preserve their electronic stored data. Defendants admit to not implementing proper procedures, not following up on the preservation policies, and permitting employees to delete emails at will.

Defendants argue that the Liquidators cannot prove when the electronic data was destroyed, but such an argument only demonstrates that the Defendants themselves lacked the

knowledge because of their own failure to preserve evidence. If Defendants had properly exercised their duty to preserve under Rule 37, the Defendants would have been able to provide this Court with proof of what was in existence when the litigation holds were put in place. Indeed, this Court instructed some of the Defendants to provide a witness to testify to the storage policies in place at the companies. This would've been the Defendants' opportunity to show the Court and the Liquidators what policy they had implemented at the time their duty arose.

At the deposition in this case, their witness could've testified to what the company did in order to preserve documents, and could've testified to whether any emails were in existence at the time the litigation commenced. Instead, and this is after reading the transcript of the 30(b)(6) witness, Defendants chose to provide a witness who was completely incapable of speaking to each of these companies separately and distinct data retention policies. Allowing such a witness to testify demonstrates that the Defendants likely had no person who could testify to their litigation hold and data retention policies because no policies were never put into place, were never properly enforced, or some combination of the two.

It is clear to the Court that the Defendants have utterly failed to demonstrate that they properly preserved

their electronic data. Defendants argued that they preserved non-electronic data and provided Defendants with the same. Rule 37 governs only electronically stored information. As to whether the loss was intentional, "An intent to deprive can be found either from a conscious act of destruction or a conscious dereliction of known duty to preserve electronic data." Mule v. 3-D Building and Construction Management Corp., 2021 W.L. 2788432 (E.D.N.Y. 2001). The Liquidators have proved Defendants' conscious dereliction of duty to preserve.

The Court grants the Liquidators Motion to Sanction Debtors. The Court is restoring the Liquidators to the same position they would have been without the spoilage. In the proposed order, attorneys for the Liquidators, the motion is granted. The Defendant is precluded from arguing any time in these cases that, A, or one, whatever you want to do -- A, it did not communicate internally or externally about its investments in the funds via email, including but not limited to -- and I have this as an "I" -- communications regarding its use of correspondent accounts; and II, communications with U.S.-based entities or individuals.

And then B, such communications did not include diligence on the funds, the funds investment strategy, and/or Bernie L. Madoff's Investment Securities, LLC; and C,

such communications are limited to the volume or frequency that the Liquidators can demonstrate by use of evidence produced by third parties. And then three, an adverse inference is entered against the Defendants that the spoilage evidence would have been favorable to Liquidators in establishing personal jurisdiction over the Defendants; and four, this order is without prejudice to the Liquidators' ability to seek additional sanctions at the jurisdictional phase of this case to remedy the prejudice calls by Defendants' spoliation.

Now to the other BIX Defendants in Adversary Proceeding 10-03635 and 10-03636. The Liquidators argued that Banque Internationale Luxembourg SA Dexia Banque International a Luxembourg, or BIL, was argued immediately learned of Madoff's collapse took steps to preserve information relating to those funds shortly thereafter. After contacting counsel within days of the BLMIS collapse, BIL created a Madoff task force that began collecting and preserving documents and electronically stored information relating to non-Fairfield feeder funds, but it never preserved documents with respect to Fairfield Sentry.

Instead, it waited 23 months until November of 2010 before preserving any electronically stored information regarding its investment in Fairfield Sentry. In November 2010, one litigation hold was circulated as to Fairfield,

but no institutional steps were taken to preserve evidence. Counsel did not familiarize itself with the data retention system. No employee interviews were conducted to determine who should receive a litigation hold, and as a result, two key employees never received the hold. No one ever followed up to collect the electronic information on the hold until 2022 when BIL attempted to collect the discovery in response to the personal jurisdiction issue.

The Liquidators argue that BIL acted in 2010 to preserve evidence -- if BIL acted in 2010 to preserve evidence, it would all be available today because its policy was to retain electronic information for a period of 10 years. Thus, the 2002 through 2008 information should not have been deleted in 2010 when the litigation hold went into effect. BIL opposes the motion. They admit the data was not preserved, but argue that no duty to preserve arose until August the 30th, 2010, and that the scope of the duty to preserve was unclear.

They argue that they did not have enough information to focus on a single redemption at issue in this case -- on the single redemption at issue in this case. Again we go back to Rule 37. 37(e) of the Federal Rule of Civil Procedure governs a party's failure to preserve electronically stored information. 37(e) states if electronically stored information that should have been

preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it and it cannot be restored or replaced through additional discovery, the court, upon finding prejudice to another party from the loss of the information, may order measures no greater than necessary to cure the prejudice or only upon finding the party acted with the intent to deprive another party of the information used in the litigation may, A, presume that the lost information was unfavorable to the party; B -- and I skipped the first part -- must presume the information was unfavorable to the party; and C, dismiss the action or enter a default judgment.

It is clear from the evidence presented BIL failed to preserve electronically stored information. BIL admits that it did not place a litigation hold on its server, and as such, external emails from 2007 were deleted in 2017 almost seven years after its duty to preserve arose. As to electronic stored information on internal emails, BIL has not provided any reasonable explanation for why it failed to preserve this data, just that emails were deleted in the matter of course. Had BIL acted under its duty to preserve by changing its policies to prevent employees from deleting emails, it would be very easy to demonstrate to the Court what emails were in existence at the time the duty arose.

BIL also admits that it failed to preserve meta

data on all of its email communications, including CC and BCC. This type of data is a significant -- is of significant importance in a case like this one where the Liquidators have shown BIL's intention to invest in the United States. In a similar case, BCCs and CCs have been used to demonstrate the Defendants were in direct communication with the Fairfield-Greenwich Group or BLMIS about the redemptions in question, both of which are located in New York. These emails cannot be restored or replaced, and it is not clear what has been lost.

As to the scope of what needed to be preserved is relevant information. The types of emails necessary to make a showing of personal jurisdiction are not different than the emails that would be relevant to any other litigation associated with these kind of claw-back cases. All emails regarding are to and from Fairfield and BLMIS at a minimum should've been preserved. It is reasonable for BIL to have expected their communications with or about their investments in Fairfield and BLMIS to be relevant to any litigation that may arise. Jurisdictional evidence is not different.

AS to whether litigation over a specific redemption was foreseeable, of course it was. Claw-backs actions are common, and as such, evidence as all redemptions should've been preserved. "It is not sufficient to notify

employees of a litigation hold and expect that the party will retain and produce all relevant information." Zubulake v. UBS Warburg, 229 F.R.D. 422. Rather, a party "must identify all sources of potential relevant evidence and supplement a litigation -- and implement a litigation hold by suspending any routine document destruction or other processes involved in the ordinary course of business that might result in the destruction of potentially relevant evidence." Skyline Steel, LLC v. PilePro, LLC, 101 F.Supp. 3d 394 (S.D.N.Y. 2015).

"Where a party fails to timely institute a formal litigation hold, the court can conclude that it did not undertake reasonable steps to preserve electronically stored information." Europe v. Equinox Holding, 592 F.Supp. 3d 167 (S.D.N.Y. 2022). It is clear from the evidence presented today that no reasonable steps were taken to preserve this data. While the Court has broad discretion in crafting of sanctions for spoliation of evidence, the sanctions "should be designed to deter parties from engaging in spoliation: two, place the risk of erroneous judgment on the party who wrongfully created the risk; and three, restore the prejudiced party to the same position it would've been in absence of the wrongful destruction of the evidence by the opposing party." West v. Goodyear Tire and Rubber, 167 F.3d 776 (2nd Cir. 1999).

The Second Circuit has stated that dismissal of an action would only be imposed where there was a showing of willfulness, bad faith, or fault over part of the sanctioned party. Absent these, the courts are encouraged to craft sanctions such as instructing the jury that a certain fact is found precluding a party from introducing evidence on a particular issue or preventing a witness from testifying about spoliation evidence. "It is well-established and a longstanding principle of law that a party's intention destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would've been unfavorable to the party responsible for its destruction." Kronish v. United States, 150 F.3d 112 (2nd Cir. 1998).

In order for an adverse interest to arrive from the destruction of evidence, the parties -- the party having control over the evidence must have had an obligation to preserve it at the time it was destroyed. This obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation. Most commonly when the suit has already been filed providing the party responsible with the destruction with express notice, but also on occasion in other circumstances. As for example, when a party should've known that the evidence may be relevant to future litigation.

"Once a court has concluded that the party was under an obligation to preserve the evidence that was destroyed, it must then consider whether the evidence was intentionally destroyed or the likely contents of that evidence." Again, that's a quote from the Second Circuit. Intent is rarely proved by direct evidence. As such, courts have "substantial leeway to determine intent through consideration of circumstantial evidence, witness credibility, motives of the witness in a particular case, and other factors. In considering these factors, courts may look to how a party acted throughout the litigation, during discovery disputes, including whether there is a credible explanation for the party's failure to preserve relevant electronically stored information." In re Petters Company, 606 B.R. 803 (Bankr. D. Minn. 2019).

Of course, the court cannot hold the prejudiced party to too strict a standard regarding the likely contents of destroyed evidence as doing so "would subvert the prophylactic and punitive purpose of the adverse inference and would allow parties who have intentionally destroyed evidence to profit from that destruction." The Second Circuit has stated that the level of proof that will suffice to support an inference in favor of the innocent party on a particular issue must be less than the amount that would suffice to survive summary judgment on that issue.

Otherwise, innocent parties meant to benefit from the adverse inference against offending parties would receive no benefit at all having been deprived of the evidence that may have been crucial to making their case, and yet being held to precisely the same standard of proof before they may present their case to a jury. And that's continuing from Petters. Here, the Liquidators have met their burden of demonstrating that they have been prejudiced by the loss of evidence. The Liquidators have provided copies of emails that they received from third parties demonstrating that there is at least some relevant information that has been lost.

They have also met their burden of demonstrating that the lost evidence in question would likely have contained relevant evidence regarding personal jurisdiction because the emails have been obtained from third parties are relevant in -- to this issue. It is possible that additional similar or more relevant emails existed and were lost.

As to the Defendants' duty to preserve, it is clear that they were all on notice of their duty to preserve at least as early as when these cases were filed though the case can be made to say their duty to preserve arose at the time Madoff was arrested. Even if the duty did not arise until these complaints were filed against them, the

Liquidators have provided evidence that the Defendants utterly failed to preserve their electronically stored data. Defendants admit to not implementing proper procedures, not following up on any preservation policies, and permitting employees to delete emails at will. Defendants argue that the Liquidators cannot prove when the electronic data was destroyed, but such an argument only demonstrates that the Defendants themselves lacked the knowledge because of their own failure to preserve evidence.

If the Defendants had properly exercised their duty to preserve under Rule 37, the Defendants would have been more able to provide this Court with the proof of what was in existence when the litigation hold was put in place. As to whether the loss was intentional, "an intent to deprive can be found either from the conscious act of destruction or a conscious dereliction of known duty to preserve electronic data." Mule v. 3-D Building Construction Management Corp., 2021 W.L. 2788432 (E.D.N.Y. July 2, 2021).

The Liquidators have proved Defendants' conscious dereliction of duty to preserve. The Court grants the Liquidators' Motion to Sanction Banque Internationale A Luxembourg. The Court is restoring the liquidation -- is restoring the Liquidators to the same position they would've been without the spoilage. The order -- submit an order,

and the order should show that the motion is granted, should state the motion is granted. It is now therefore and hereby ordered that the motion is granted; that, two, the Defendant is precluded from arguing at any time during the litigation of this case that, A, it did not communicate internally or externally about its investments in the funds via email, included but not limited to communications regarding its use of correspondence actions accounts -- correspondent accounts; and two, communications with U.S.-based entities or individuals.

B, such communications did not include diligence on the funds, the funds investment strategy, or Bernie L. Madoff Securities Investments, LLC, and such communications are limited to the volume or frequency that the Liquidators can demonstrate by use of evidence produced by third parties. Three, an adverse inference is entered against Defendants that any spoilage evidence would have been favorable to Liquidators in establishing personal jurisdiction over the Defendant; and four, this order is without prejudice to the Liquidators whose ability to seek additional sanctions at the jurisdictional phase of this case to remedy the prejudice caused by the Defendants' spoliation. Submit an order.

Thank you very much, and I apologize for stumbling.

MR. MARGOLIN: Thank you very much, Your Honor.

MR. MACKINNON: Thank you, Your Honor.

THE COURT: Have a good day.

MR. BUTLER: Thank you, Your Honor.

MR. FLUGMAN: Thank you, Your Honor.

THE COURT: Chambers.

(Whereupon these proceedings were concluded)

I N D E X

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: March 21, 2023